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95-1154

Supreme Court
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No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DALKON SHIELD CLAIMANTS TRUST,

Petitioner,

v.

SUSAN SHADBURNE-VINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether a statute that purports retroactively to repeal a statute of repose, for the express purpose of reviving causes of action that have already been extinguished by the prior statute of repose, violates the Due Process Clause under the controlling authority of *William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925)

Parties

The plaintiff/appellant below was Susan Shadburne-Vinton, n/k/a Susan Shadburne.

The defendant/appellee below was the Dalkon Shield Claimants Trust.

The following parties filed briefs as amicus curiae in the court below:

American Insurance Association;
Oregon Trial Lawyers Association; and
Pharmaceutical Research and Manufacturers of America.

Pursuant to Rule 29.6, the Dalkon Shield Claimants Trust states that it is not a corporation and further that it has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner respectfully asks that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 60 F.3d 1071 (4th Cir. 1995). The opinion of the United States District Court for the District of Maryland is reported at 851 F. Supp. 712 (D. Md. 1994). The foregoing opinions and the Court of Appeals order denying rehearing are contained in the Appendix to this petition.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered on July 26, 1995. Petitioner timely filed a petition for rehearing in that Court on August 9, 1995. That Court denied the petition for rehearing on October 19, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). 28 U.S.C. § 2403(b) may apply. To petitioner's knowledge, neither the District Court nor the Court of Appeals certified to the Attorney General of Oregon the fact that the constitutionality of a statute of Oregon was drawn into question. This petition for writ of certiorari is being served on the Attorney General of Oregon contemporaneous with its service upon all parties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that "No State shall [deprive] any person of life, liberty or property, without due process of law . . . . " This petition also involves ORS 30.905, Oregon Laws 1987 c.4 §§ 5-10, and Oregon Laws 1989 c.642 § 2. Those statutory provisions are contained in the Appendix.

STATEMENT

The issue presented in this petition concerns the constitutionality of the Oregon legislature's attempt to revive a claim that the products liability statute of repose had already extinguished by retroactively removing the product at issue from the repose statute's reach.

The Fourth Circuit majority opinion effectively acknowledged that two of this Court's cases, *William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925), and *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945), would require affirmance of the District Court's conclusion that the revival legislation violated Due Process. Over a dissent, however, the majority reversed, based on its perception that *Danzer* and *Chase* are "outdated and no longer valid" -- even though those decisions have never been overruled by this Court. 60 F.3d at 1076.

In addition to departing candidly from this Court's precedents, the Fourth Circuit majority opinion also conflicts with the federal Due Process decisions and analysis of the appellate courts of Maryland, North Carolina, Virginia, West Virginia and Wisconsin.

The Fourth Circuit majority opinion also conflicts with decisions from federal courts in the Eighth and Ninth Circuits, which have recognized the continuing validity of *Danzer* and *Chase*.

The legislative action at issue in this petition reflects an emerging trend of legislatures responding to the political pressure exerted by the personal injury plaintiffs' bar to enact revival statutes directed at the manufacturers of whatever product is the most recent topic of litigation publicity. Recent history in Oregon, the state involved in this case, is illustrative. The legislation here purports to revive time barred claims relating to use of an intrauterine device ("IUD"). Several years after that legislation was passed, the Oregon legislature revived products liability breast implant claims previously barred by the statute of repose. Later still, the Oregon legislature revived repose-barred products liability cases involving pick-up trucks with side-saddle gas tanks mounted outside the frame rail.

In light of this legislative trend, the Fourth Circuit's frank decision not to follow this Court's opinions in *Danzer* and *Chase*, and the irreconcilable inconsistency between the Fourth Circuit's opinion and the decisions of other state and federal appellate courts, this Court should grant this petition to settle the issue of whether a legislature can

constitutionally revive a claim that has been extinguished by a statute of repose.

BACKGROUND

Respondent Susan Shadburne alleges that she was injured by two Dalkon Shield IUDs, manufactured and sold by A.H. Robins Co., Inc. ("Robins"). The second of Shadburne's two Dalkon Shields was purchased and inserted in Oregon, her state of residence, on March 1, 1974. As of March 1, 1982, eight years after Shadburne obtained her second IUD, the Oregon statute of repose provided, in relevant part:

> [A] product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption.

ORS 30.905(1). Shadburne did not file her suit until 1983. [1/]

1/ The procedural history of this case is outlined in the Fourth Circuit majority opinion. In short, Shadburne filed suit in 1983 in the United States District Court for the District of Maryland, invoking that Court's diversity jurisdiction under 28 U.S.C. § 1332. Her case was dismissed pursuant to the statute of repose in 1984. While the case was on appeal to the Fourth Circuit for the first time, Robins filed for bankruptcy. The Dalkon Shield Claimants Trust (the "Trust"), petitioner herein, was eventually substituted as the party defendant. Upon compliance with the procedures imposed by the bankruptcy court, Shadburne's case resumed in federal court in Maryland in 1992 after she had refused the Trust's offer of settlement. By that time, the Special IUD Statute had been passed. The District Court dismissed Shadburne's case on May 19, 1994,

Footnote continued on next page

In 1987, Oregon enacted a statute providing that the Oregon statute of repose would not bar product liability actions seeking damages for IUD-related injuries. Or. Laws 1987 c. 4 §§ 5-10. The Oregon Legislative Assembly renewed the effect of that statute in 1989. Or. Laws 1989 c. 642 § 2. (The 1987 and 1989 statutes are referred to herein as the "Special IUD Statute.") The Special IUD Statute was to apply retroactively, such that it would revive a claim even if the claim was previously extinguished by expiration of the statute of repose.

Ten years after the original eight-year statute of repose had extinguished her cause of action, Shadburne invoked the Special IUD Statute as a basis for sustaining her previously dismissed claim. The District Court once again dismissed Shadburne's claim because it found that the Special IUD Statute was unconstitutional under the Due Process Clause. A divided panel of the Fourth Circuit reversed.

REASONS FOR GRANTING THE PETITION

I. The Special IUD Statute is Unconstitutional Under this Court's Decisions in *Danzer* and *Chase*.

The Fourth Circuit refused to apply this Court's holding in *William Danzer Co. v. Gulf & Ship Island R.R. Co.*, 268 U.S. 633 (1925), that timeliness requirements that define the parties' substantive rights -- as opposed to timeliness requirements that merely regulate a party's access to the courts -- may not be retroactively enlarged. *Id.* at 636-37. In *Danzer*, the plaintiff filed suit on a cause of action created by a statute providing that suit must be

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Footnote continued from previous page

leading to the Fourth Circuit appeal to which this petition is directed.

brought within two years of injury. More than two years after the plaintiff suffered its injury and before the plaintiff had filed suit, Congress passed a new law, suspending the two-year period under certain circumstances. The plaintiff then sued, relying upon a retroactive application of the suspension to render its case timely.

This Court held for the defendant. Citing a series of authorities noting the substantive purpose of the original timeliness requirement in the statutory scheme at issue, the Court held that "[t]he lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff. On the expiration of the two-year period, it was as if liability had never existed." 268 U.S. at 636.

As evidenced by the Court's discussion of *Campbell v. Holt*, 115 U.S. 620 (1885), *Danzer* clearly turned on the Court's conclusion that the timeliness requirement involved in *Danzer* -- as distinguished from conventional statutes of limitation -- was intended to extinguish the defendant's liability. In *Campbell v. Holt*, the Court permitted legislative revival of a claim barred by the expiration of an ordinary statute of limitations. That case however:

> belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability.

268 U.S. at 636-37. To permit revival of a claim extinguished by the latter kind of statute "would be to deprive the defendant of its property without due process of law in contravention of the Fifth Amendment." *Id.*

As the Fourth Circuit recognized in this case, *Danzer*'s holding was reaffirmed in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). In *Chase*, a Minnesota plaintiff brought a common law tort action, the timeliness of which was governed by the state's general

statute of limitations. While the suit was pending, the Minnesota legislature enacted a new statute of limitations which enlarged the limitations period and applied to claims that already were time-barred before the new statute was passed. Consistent with the distinction announced in *Danzer*, this Court applied the rule established in *Campbell v. Holt* that a state may enlarge a conventional statute of limitations even after the previous limitations period has expired, provided that the previous limitations period was not designed to define the parties' substantive rights. *See Chase*, 325 U.S. at 311-12.

The *Chase* decision specifically reaffirmed *Danzer*. The Court noted the absence of any suggestion that: a) Minnesota's applicable tort statute of limitations was designed to condition the plaintiff's right to bring her cause of action; or b) the expiration of the original time period was intended to terminate the underlying liability. This Court recognized that *Danzer* remained good law and would bar enlargement of a time period that would "confer on [the plaintiff] a new right or subject [the defendant] to a new liability" after the pre-existing right or liability had been extinguished. *See* 325 U.S. at 312, n.8.

The majority opinion of the Court of Appeals in this case acknowledged that statutes of repose are the kind of timeliness statute that fall within this Court's *Danzer/Chase* prohibition on revival of extinguished claims. Courts distinguish repose statutes from limitations statutes in various contexts including choice of law analysis where repose statutes are found to be a substantive part of the parties' rights while limitations statutes are found to be merely procedural. *See, e.g., Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1223 (10th Cir. 1991); *Boudreau v. Baughman*, 368 S.E.2d 849, 857 (N.C. 1988); *Goad v. Celotex*, 831 F.2d 508, 511 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988). The statutes have also been distinguished in other contexts. *See, e.g., Langley v. Pierce*, 438 S.E.2d 242, 243-44 (S.C. 1993) (statute of repose not tolled by defendant's absence from state); *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 865-66

(4th Cir. 1989) (statute of repose not tolled by defendant's fraud), *cert. denied*, 493 U.S. 1070 (1990).

The same distinction applies in the specific context of the Oregon statute of repose. In *Pottratz v. Davis*, 588 F. Supp. 949 (D. Md. 1984), the court noted that when the timeliness statute "'bars the rights and not merely the remedy,'" the statute "'is considered substantive.' The statute, if conceived of as a grant of immunity from suit, is also considered to be substantive." 588 F. Supp. at 952 (citation omitted). The *Pottratz* court then concluded that the Oregon statute of repose "does not operate to bar a remedy; it prevents a cause of action from ever arising." *Id.*; *see also Walls v. General Motors, Inc.*, 906 F.2d 143, 146 (5th Cir. 1990) (Oregon statute of repose is substantive law).

The Oregon statute of repose is precisely the kind of substantive statute that was involved in *Danzer*. As with the timeliness provision in *Danzer*, "the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff." *Danzer*, 268 U.S. at 636; *compare Pottratz*, 588 F. Supp. at 953 (Oregon statute of repose "bars the right, not merely the remedy"); *see also Goad*, 831 F.2d at 511 ("When a statute of repose has been enacted, the time for filing suit is engrafted onto a substantive right created by law."). The Oregon statute of repose is not directed at mere remedies such that *Chase* and *Campbell v. Holt* would permit its enlargement. Once the statute of repose extinguished Shadburne's cause of action, the Oregon legislature could not constitutionally revive it.

Pursuant to this Court's Rule 10.1(c), this Court should grant this petition for a writ of certiorari to correct the Fourth Circuit's resolution of the constitutionality of what is becoming an increasingly common form of special legislation with regard to currently unpopular products.

II. The Fourth Circuit majority conflicts with the opinions of numerous state appellate courts.

Numerous state appellate courts have held that *Danzer* precludes retroactive enlargement of timeliness

provisions that are designed to extinguish liability. In *Colony Hill Condominium I Ass'n v. Colony Co.*, 320 S.E.2d 273 (N.C. App. 1984), *review denied*, 325 S.E.2d 485 (N.C. 1985), involving nearly identical facts, the court applied *Danzer* and held: "Once the [prior] statute of repose barred the plaintiffs' suit, however, a subsequent statute could not revive it." 320 S.E.2d at 276.

Similarly, in *School Bd. of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325 (Va. 1987), also under nearly identical facts, the plaintiff attempted to rely upon *Chase* and *Campbell v. Holt* for the proposition that a legislature can enlarge a repose period after the prior repose period expires. The Virginia Supreme Court explicitly rejected this reliance, holding that *Chase* and *Campbell v. Holt* were mere statute of limitations cases, having no application to the very different situation presented by a statute of repose. 360 S.E.2d at 327-28.[2/]

The same federal constitutional issue has arisen in the context of revival of claims that had been extinguished by the timeliness requirement of wrongful death statutes. These timeliness requirements, like statutes of repose, are considered part of the parties' substantive rights. The high courts of Maryland and Wisconsin have held that *Danzer* precludes retroactive enlargement of these timeliness provisions. *See Smith v. Westinghouse Elec. Corp.*, 291 A.2d 452, 455 (Md. 1972); *Haase v. Sawicki*, 121 N.W.2d 876, 881 (Wis. 1963); *see also Lester v. State Workmen's Compensation Comm.*, 242 S.E.2d 443, 452 n.15 (W. Va. 1978) (under *Danzer*, the legislature "may not extend a period of limitation after it has expired where the limitation period is part of the substantive right").

2/ Although the court's ultimate holding was based on the Due Process Clause of the Virginia Constitution, it relied on *Chase* and *Campbell v. Holt* in a manner inconsistent with the Fourth Circuit majority opinion.

The Fourth Circuit majority opinion cannot be reconciled with the federal Due Process analysis and holdings of each of these state appellate courts. Pursuant to this Court's Rule 10.1(a), this conflict between the decision of the Fourth Circuit and the state courts of last resort is an additional reason for granting this petition for a writ of certiorari.[3]

III. The Fourth Circuit majority conflicts with the opinions of other federal courts.

In addition to the state court decisions cited *supra*, other federal courts have recognized the continuing vitality of the *Danzer/Chase* rule. In *In re Alodex Corp. Sec. Litig.*, 392 F. Supp. 672 (S.D. Iowa 1975), *aff'd*, 533 F.2d 372 (8th Cir. 1976), after a lengthy examination of *Danzer* and *Chase*, the court held that *Danzer* prohibits retroactive enlargement of the time to sue under the Iowa Blue Sky Law. *Id.* at 681. The Eighth Circuit "affirm[ed] on the basis of the well-reasoned District Court opinion." 533 F.2d at 374; *see also Davis v. Valley Distrib. Co.*, 522 F.2d 827, 830 n.7 (9th Cir. 1975) (*Campbell v. Holt* rule did not apply in *Danzer* because "Congress had intended the expiration of the limitations period to put an end to the existence of the liability itself, not to the remedy alone"), *cert. denied*, 429 U.S. 1090 (1977); *Starks v. S.E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982) (*Chase* "distinguished *Danzer* on

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3/ It should be noted that, as a matter of state constitutional law, many states have held that even a conventional statute of limitations may not be enlarged after it has expired as to particular claim. *See Waller v. Pittsburgh Corning Co.*, 742 F. Supp. 581, 583-84 (D. Kan. 1990) (collecting cases), *aff'd*, 946 F.2d 1514 (10th Cir. 1991).

the grounds that Congress had intended the expiration period to put an end to the liability itself, not to the remedy alone").

These federal decisions are inconsistent with the Fourth Circuit majority's determination that the *Danzer/Chase* rule is no longer good law. Pursuant to this Court's Rule 10.1(a), this conflict between the decision of the Fourth Circuit and other lower federal courts is an additional reason for granting this petition for a writ of certiorari.[4/]

IV. The Fourth Circuit majority erred when it concluded that the *Danzer/Chase* rule is "outdated and no longer valid."

The Fourth Circuit majority acknowledged the *Danzer/Chase* rule set forth above. The court also acknowledged the distinction between statutes of repose and statutes of limitation. The court concluded, however, that subsequent decisions from this Court render the *Danzer/Chase* rule "outdated and no longer valid." As set

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4/ The conflict among the lower federal courts is further highlighted by *Wesley Theological Seminary v. United States Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), which upheld a statute in the asbestos context similar to the statute upheld by the Fourth Circuit here. *Wesley*, however, simply did not cite *Danzer*. In addition, *Wesley* rejected the well-recognized distinction between statutes of repose and statutes of limitations, which the D.C. Circuit dismissed as being too "metaphysical." See 876 F.2d at 122. The District Court in *Wesley*, like the District Court here, had correctly recognized that the revival legislation was constitutionally infirm.

forth herein, this conclusion rests on an erroneous interpretation of this Court's subsequent precedents. In any event, it is not the task of the Courts of Appeals to decide that clear decisions of this Court have been overruled *sub silentio*. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

A. The Cases Cited by the Fourth Circuit Majority Do Not Involve a Legislature's Power to Divest a Grant of Immunity.

To support its view that the *Danzer/Chase* rule is "outdated and no longer valid," the Fourth Circuit majority relied primarily upon *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In that case, this Court upheld a congressional occupational disease compensation scheme pursuant to which coal mine operators could be required to compensate miners who had already concluded their employment at the time that the statute was passed. The operators acknowledged "Congress' power to create a program for compensation of disabled inactive coal miners," *id.* at 15, as well as "Congress' power to impose the burden of past mine working conditions on the industry." *Id.* at 18. They argued, however, that the statute was unconstitutional because if Congress had properly analyzed the economics of the coal industry, it would have spread the cost of compensation among all current operators rather than imposing that cost upon the individual operator in whose mine a given retired miner had worked. *Id.* at 18.

Critically, the operators did not -- and could not -- argue that the retroactive imposition of liability upon them stripped them of a legislative grant of immunity. There was nothing in the law prior to passage of the statute that conferred such immunity. *Turner Elkhorn* merely upheld the

well-established proposition that the Constitution does not authorize the Court to adjudicate the wisdom of Congress' selection of guiding economic principles. The case did not address the *Danzer/Chase* issue of whether the legislature, having once granted immunity through a statute of repose, can retroactively take it away.

The Fourth Circuit majority also relied upon *Pension Benefits Guaranty Corp. v. Gray*, 467 U.S. 717 (1984). The statute at issue in that case retroactively imposed "withdrawal liability" upon employers withdrawing from multiemployer pension plans governed by ERISA. Upholding the statute, the Court noted the "strong deference accorded legislation in the field of national economic policy." *See* 467 U.S. at 729; *see also id.* at 731 (noting "limited judicial review accorded economic legislation under the Fifth Amendment"). As in *Turner Elkhorn*, the Court in *Gray* was not presented with the issue of whether the legislature could strip a party of a grant of immunity.

General Motors Corp. v. Romein, 112 S. Ct. 1105 (1992), the final case upon which the majority relied, involved a provision of Michigan's worker's compensation statute requiring recalculation of benefits that had already been paid. The Court noted the economic nature of the legislation and held that the statute did not violate Due Process. *See* 112 S. Ct. at 1112. Again, the Court was not confronted with the legislative removal of a prior grant of immunity.

The Fourth Circuit majority's conclusion that the foregoing cases render the *Danzer/Chase* rule "outdated and no longer valid" also cannot be reconciled with this Court's decision in *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), decided five months **after** *Turner Elkhorn* case relied upon so heavily by the majority. In that case, Congress had enlarged retroactively the statute of limitations for filing discrimination claims with the EEOC. The defendant challenged the enlargement with an "unwarrantedly broad reading" of *Danzer*. *See* 426 U.S. at 243. This Court cited *Chase*'s holding that "lifting the bar of a statute of limitation

so as to restore a remedy lost through mere lapse of time" is permissible under the Due Process Clause. *Id.* at 243-44 (emphasis added). If *Turner Elkhorn* had overruled the *Danzer/Chase* distinction between remedial and substantive time bars for purposes of constitutional analysis, this Court would not have applied that rule in a decision issued several months after *Turner Elkhorn*. As the Fourth Circuit dissent and the District Court noted, "*Robbins & Myers* [is] testament to [*Danzer*'s] continued vitality, since the opinion in [that case] distinguished [itself] from the substantive impairment found in *Danzer*." *See* 60 F.3d at 1079.

B. The *Danzer/Chase* Rule Has Always Coexisted With the Rule Underlying the Cases Relied Upon by the Fourth Circuit Majority.

Contrary to the Fourth Circuit majority's interpretation, the three cases that supposedly altered the *Danzer/Chase* rule in fact applied a general rule of law applicable to retroactive economic legislation that had existed at the time that both *Danzer* and *Chase* were decided. To support the very proposition in *Turner Elkhorn* quoted and relied upon by the majority, 60 F.3d at 1075, this Court had cited a series of cases dating from 1911 through 1947, a time span that includes the years in which *Danzer* (1925) and *Chase* (1945) were decided. In *Gray*, also heavily relied upon by the Fourth Circuit majority, the Court referred to the standard applied to the constitutional analysis of retroactive legislation in the 1938 case of *Welch v. Henry*, 305 U.S. 134 (1938), and held: "that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn*." 467 U.S. at 733. The general principles governing the constitutionality of retroactive legislation have not changed since the decisions in *Danzer* and *Chase*.

Rather than being an "outdated and no longer valid" mode of analysis, the *Danzer/Chase* rule reflects the special analysis that this Court has always applied to the unique Due Process problem posed by enlargement of an expired time

bar. That rule has never been governed by the Court's jurisprudence governing retroactive legislation in general. The *Danzer/Chase* rule does not rest on the principle that legislation cannot be applied retroactively; it rests on the principle that once immunity has been granted, liability cannot be revived. That principle is still good law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 17, 1996

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUSAN SHADBURNE-VINTON,
Plaintiff-Appellant,

AND

WILLIAM G. VINTON,
Plaintiff,

v. No. 94-1820

DALKON SHIELD CLAIMANTS TRUST,
Defendant-Appellee.

OREGON TRIAL LAWYERS ASSOCIATION; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA; THE AMERICAN INSURANCE ASSOCIATION,
Amici Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frank A. Kaufman, Senior District Judge.
(CA-83-160-K)

Argued: April 6, 1995

Decided: July 26, 1995

Before RUSSELL and WIDENER, Circuit Judges,
and CHAPMAN, Senior Circuit Judge.

Reversed by published opinion. Senior Judge Chapman wrote the opinion, in which Judge Russell joins. Judge Widener wrote a dissenting opinion.

COUNSEL

ARGUED: Michael Albert Pretl, PRETL & ERWIN, P.A., Baltimore, Maryland, for Appellant. Dino Santo Sangiamo, VENABLE, BAETJER & HOWARD, Baltimore, Maryland, for Appellee. **ON BRIEF:** Paul F. Strain, Elizabeth C. Honeywell, VENABLE, BAETJER & HOWARD, Baltimore, Maryland, for Appellee. Arthur C. Johnson, Douglas C. Schaller, JOHNSON, CLIFTON, LARSON & CORSON, P.C., Eugene, Oregon, for Amicus Curiae Oregon Trial Lawyers; Bruce J. Brennan, Marjorie E. Powell, Washington, D.C., for Amicus Curiae Pharmaceutical Research; Robert E. Scott, Jr., Christopher W. Poverman, SEMMES, BOWEN & SEMMES, Baltimore, Maryland, for Amicus Curiae Insurance Association.

OPINION

CHAPMAN, Senior Circuit Judge:

Appellant Susan Shadburne-Vinton ("Shadburne") was injured by a Dalkon Shield Intrauterine Device ("IUD") manufactured by A.H. Robins Company ("Robins") that she

used from March, 1974 until December, 1976. She filed suit against Robins in January, 1983 in the United States District Court for the District of Maryland. Because Shadburne was an Oregon resident, Oregon law controlled, and the district court dismissed her suit under the Oregon statute of repose for failure to timely file. Shadburne appealed the dismissal; however, pending the appeal, Robins entered bankruptcy proceedings, and the bankruptcy court stayed all Dalkon Shield litigation. During the pendency of the bankruptcy proceedings, the Oregon legislature amended the statute of repose to exclude IUD manufacturers as a protected class of defendants.

Following the conclusion of the Robins bankruptcy proceedings in 1989, Shadburne sought to reinstate her initial claim. The Dalkon Shield Claimants Trust ("the Trust," substituted for Robins pursuant to reorganization) agreed to reinstatement, but reserved the right to challenge the amendment to Oregon's statute of repose. The Trust moved for judgment on the pleadings claiming that the amendment violated its due process rights and claiming that the original statute of repose governed Shadburne's suit. On May 19, 1994, the district court granted the Trust's motion, and Shadburne appeals.

For the reasons discussed below, we reverse the district court's ruling.

I.

Shadburne received her first IUD in February, 1973 which was replaced by a second IUD in March, 1974. After an acute episode of pelvic inflammatory disease, the doctor surgically removed the IUD in December, 1976. Shadburne, along with many other plaintiffs, filed suit in Maryland

district court[1] against Robins claiming that the IUD rendered her infertile and caused multiple sclerosis. Because Shadburne and the other plaintiffs were Oregon residents, Oregon's substantive law controlled. Robins moved for judgment on the pleadings on the basis of Oregon's original statute of repose which provided that "a product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption." Or. Rev. Stat. § 30.905(1) (1983) (current version at Or. Rev. Stat. § 30.905(l) (1993)). On December 20, 1984, the district court granted Robins's motion finding that Shadburne filed suit more than eight years after she purchased the IUD. Shadburne and 41 other dismissed plaintiffs appealed.

During the pendency of the appeal, Robins filed for bankruptcy, and the bankruptcy court stayed all Dalkon Shield litigation. In 1987, while the bankruptcy proceedings continued, the Oregon legislature amended the statute of repose to exclude IUD manufacturers[2] as protected defendants. 1987 Or. Laws ch. 4 §§ 5-10. Section 5 applied a two year discovery rule statute of limitations without the eight year repose feature, and section 6 made this rule applicable to all causes of action tried after the statute's effective date. Section 7 described a limitation of July 1,

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1/ Shadburne filed suit in Maryland rather than Oregon because she also sued the Dalkon Shield's inventor, and he was not subject to suit in Oregon.

2/ The Oregon legislature excluded asbestos manufacturers in an earlier amendment, Or. Rev. Stat. § 30.907 (1993), and has since excluded breast implant manufacturers, Or. Rev. Stat. § 30.908 (1993).

1989, for filing such actions, and Sections 8 and 9 established a one year period for refiling actions that were dismissed based upon the prior statute, or to be first commenced within one year after the statute's effective date. Because the Robins bankruptcy proceeding was still not resolved in 1989, the Oregon legislature extended the filing period set forth in the 1987 legislation to actions filed before July 1, 1995. 1989 Or. Laws ch. 642 § 1.[3/] (The 1987 and 1989 statutes are referred to collectively as the "Special IUD Statute.")[4/]

When the Robins bankruptcy proceeding was not concluded by 1989, Shadburne and the Oregon plaintiffs secured a consent order from the bankruptcy court which tolled the time for filing suit under the Special IUD Statute until 30 days after the expiration or termination of the automatic stay.

Many of the other Oregon plaintiffs settled their disputes with the Trust. When the lead appellant, Ada June Tolliver, settled her claim, the Fourth Circuit erroneously dismissed the entire appeal, intending only to dismiss Tolliver's appeal. Shadburne did not file a motion for reconsideration to correct the clerical error and keep her case alive. Shadburne claims that she did not pursue the

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3/ The 1989 amendments made several other minor changes to the 1987 act that are not relevant here. *See* 1989 Or. Rev. Stat. ch. 642.

4/ The Special IUD Statute does not have a code section in the Oregon Code; however, it does appear in the Oregon Code immediately preceding § 30.900 under the title "ACTION AGAINST MANUFACTURER OF INTRAUTERINE DEVICE."

appeal of her earlier dismissal because she deemed the appeal mooted by the Special IUD Statute and the consent order.

Because the parties could not agree to a settlement, the bankruptcy court certified Shadburne's claim, and she filed an amended complaint in the district court on October 27, 1992. The Trust filed a motion for judgment on the pleadings on June 25, 1993, claiming that the Special IUD Statute was unconstitutional, and that under the original statute of repose, Shadburne's claim was properly dismissed. The district court granted the Trust's motion finding that the Special IUD Statute violated the Trust's due process rights under the Federal Constitution, and that the original statute of repose barred Shadburne's claim. Shadburne appeals arguing that the Oregon statute does not violate the Federal Constitution.

We review questions of law *de novo*. *Richmond, Fredericksburg & Potomac R.R. v. United States,* 945 F.2d 765, 768-69 (4th Cir. 1991), *cert. denied,* 503 U.S. 1984 (1992).

II.

The district court found that retroactive enlargement of a statute of limitation does not violate the Due Process Clause of the Constitution, *Chase Sec. Corp. v. Donaldson,* 325 U.S. 304 (1945), yet retroactive enlargement of a statute of repose does. *William Danzer & Co. v. Gulf & Ship Island R.R.,* 268 U.S. 633 (1925). The district court relied primarily upon a Fourth Circuit case that distinguishes statutes of limitation from statutes of repose because the former involve only procedural rights, while the latter involve substantive rights. *Goad v. Celotex Corp.,* 831 F.2d 508 (4th Cir. 1987),

cert. denied, 487 U.S. 1218 (1988). We find *Goad* inapplicable because it separates statutes of limitation from statutes of repose for choice of law purposes, and this case presents a constitutional issue. We find that in analyzing the constitutionality of retroactive legislation, statutes of repose are now treated the same as statutes of limitation.

III.

The Trust relies primarily upon *William Danzer & Co. v. Gulf & Ship Island R.R.,* 268 U.S. 633 (1925), in which the plaintiff failed to file suit against a railroad within the time prescribed by the Interstate Commerce Act, which both created and limited the plaintiff's cause of action. Congress then enacted the Transportation Act which, if applied retroactively, would revive the plaintiff's claim. The railroad argued that reviving the plaintiff's expired cause of action violated its due process rights. The Court found "that the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff." *William Danzer & Co.,* 268 U.S. at 636 (citing *Kansas City S. Ry. v. Wolf,* 261 U.S. 133, 139 (1923); *Louisville Cement Co. v. Interstate Commerce Comm'n,* 246 U.S. 638, 642 (1918); *A.J. Phillips Co. v. Grand Trunk W. Ry.,* 236 U.S. 662, 666 (1915)). The Court further noted that statutes are presumed to be prospective unless the statute expressly states otherwise,[5/] and that it had recently held that the Transportation Act would not apply to causes of action which were barred by a state statute of limitations before the passage of the Act. *Id. (*citing *Fullerton-Krueger Lumber Co. v. Northern Pac. Ry.,* 266 U.S. 435, 437 (1925)). The Court held that sometimes a statute both creates a cause of

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5/ The Oregon statute at issue in the present case expressly states that it applies retroactively.

action and places a limitation period on its existence, and the limitation period in such statutes serve as a limitation upon liability. The Court concluded that the expiration of the time period extinguished the defendant's liability, and to revive that liability would deprive the defendant of its property without due process of law. *Id.* at 637.

The Supreme Court subsequently held in *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945), that retroactive application of a statute of limitation does not violate the Due Process Clause of the Fourteenth Amendment. The *Chase* Court distinguished *Danzer* in a footnote by noting that the statute in that case affected the defendant's liability; whereas, in *Chase* the statutes merely affected the plaintiff's remedy. The challenged statute of limitation neither conferred on plaintiff a new right nor subjected defendant to a new liability. *Chase Sec.* Corp., 325 U.S. at 312, n.8. The Court relied primarily upon its previous decision in *Campbell v. Holt, 115* U.S. 620 (1885), in which it held that

> where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar.

Chase Sec. Corp., 325 U.S. at 311-12. The Court noted that *Campbell* established "that statutes of limitation go to matters of remedy, not to destruction of fundamental rights." *Id.* at 314.

The district court found the Oregon statute of repose unconstitutional based upon *Danzer, Chase, Campbell,* and the Fourth Circuit's decision in *Goad*. *The Goad* court examined the differences between statutes of limitation and statutes of repose.

> Statutes of limitation ... are primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability, although this may be their effect.
>
> In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for acts committed long ago. Statutes of repose make the filing of suit within a specified time a substantive part of plaintiff's cause of action. In other words, where a statute of repose has been enacted, the time for filing suit is engrafted onto a substantive right created by law. The distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws.

Goad, 831 F.2d at 510-11 (footnotes and citation omitted). Although *Goad* delineates the differences between statutes of limitation and statutes of respose, those distinctions are not relevant for purposes of our inquiry in the present case because *Goad* involved choice of law principles, and in that context the distinction between procedural and substantive laws is critical in determining which state's law applies. However, in the present case we are called upon to determine

the constitutionality of a state statute, and we must employ a different analysis.

While *Danzer* and the line of cases discussed above analyzed the constitutionality of retroactive time bar statutes by drawing the substance versus procedure distinction, a more recent line of Supreme Court cases commands us to employ a different analysis. First, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Court rejected appellant's due process challenge to legislation creating a new liability upon coal mine operators for illnesses to miners for work done long before the legislation. The Court recognized:

> it is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.
>
> . . . [O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

Id. at 15-16 (citations omitted). The *Usery* Court concluded that the retroactive legislation comported with the requirements of due process.

Next, in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), the Supreme Court upheld a statute imposing liability on employers for withdrawal from pension plans even though the statute applied to employers who withdrew before the enactment of the statute. Relying upon *Usery*, the Court held that legislation imposing liabilities retroactively must only be supported by a rational legislative purpose. *Id.* at 728-30.

Finally, in *General Motors Corp. v. Romein,* the Court held that in order for retroactive state legislation to comport with the requirements of due process under the Fifth Amendment, it must serve a legitimate legislative purpose that is furthered by rational means. 503 U.S. 181, 191 (1992) (citing *Pension Benefit Guar. Corp.*, 467 U.S. at 730).

Turner Elkhorn and Pension Benefit both involved federal statutes, and *Romein* involved a state statute. Thus, the three cases together stand for the proposition that the Due Process Clause of the Fifth Amendment allows retroactive application of either federal or state statutes as long as the statute serves a legitimate legislative purpose that is furthered by rational means. We reject the district court's inference that *Turner Elkhorn* and *Pension Benefit* only apply to federal statutes involving national economic policy. While courts might accord a stronger deference to legislation affecting national economic policy, that does not suggest that a different constitutional analysis applies to non-economic legislation. Courts apply the rational basis test when reviewing the constitutionality of retroactive legislation in general, but the legislative deference may vary.

In light of this more recent Supreme Court precedent, we find that the analysis used by the Court in *Danzer, Chase,* and *Campbell* is outdated and no longer valid for purposes of

analyzing the constitutionality of retroactive legislation. The relevant inquiry is whether or not the legislation serves a legitimate legislative purpose that is furthered by rational means. In fact, the Fourth Circuit applied the reasoning of *Turner Elkhorn* in *United States v. Monsanto Co.,* 858 F.2d 160, 174 (4th Cir. 1988), *cert. denied,* 490 U.S. 1106 (1989), in determining that retroactive application of CERCLA's liability provisions does not run afoul of the Supreme Court's test for due process validity.

Our sister circuit recently considered whether retroactive application of a statute of repose violates a defendant's due process rights in *Wesley Theological Seminary v. United States Gypsum Co.,* 876 F.2d 119 (D.C. Cir. 1989), *cert. denied,* 494 U.S. 1003 (1990), and we follow the reasoning of the *Wesley* court. In that case, the defendant claimed that the ten year statute of repose barred the plaintiff's suit; however, while the case was pending, the legislature amended the statute making it inapplicable to manufacturers such as the defendant. The defendant argued that the earlier statute conferred upon it a substantive right not to be sued, and that retroactive application of the amended statute of repose violated its due process rights.

Relying upon *Turner Elkhorn* and *Pension Benefit,* the D.C. Circuit reasoned that retroactive application of the amended statute did not violate the defendant's due process rights if it served a rational legislative purpose. *Id.* at 122-23. The *Wesley* court noted that "any substance/procedure dichotomy suggested by *Chase* is either completely defunct or, at the very most, establishes procedural rules as a safe harbor within which a legislature may freely make retroactive changes." *Id.* at 122. The *Wesley* court stated that *Turner Elkhorn* and *Pension Benefit* followed Justice Holmes's view that legislative bodies are vested with a

certain amount of leeway in establishing laws. As Chief Justice of Massachusetts, Justice Holmes wrote:

> [M]ultitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.

Danforth v. Groton Water Co., 59 N.E. 1033, 1034 (Mass. 1901), *quoted in Wesley*, 876 F.2d at 121.

In predicting that the Fourth Circuit would not follow the D.C. Circuit's opinion in *Wesley*, the district court relied upon *Link v. Receivers of Seaboard Air Line Railway*, 73 F.2d 149 (4th Cir. 1934), and *Dinh v. Rust International Corp.*, 974 F.2d 500 (4th Cir. 1992). We find both of these cases inapplicable in resolving the constitutional issue before us.

The statute in *Link* provided that personal injury judgments against railroads took priority over any mortgage payments owed by the railroad as long as the personal injury plaintiff filed suit within twelve months of the injury. Link filed his suit eighteen months after his injury; however, while his appeal was pending, the legislature amended the statute to allow personal injury plaintiffs two years in which to file suit. Link argued that the amended statute applied in his case giving his judgment priority. The court held that application of the amendment to pending suits violated the railroad's due process rights because once the twelve month period expired, the plaintiff's personal injury judgment lost priority over the railroad's mortgages. The court determined that the

legislature could not revive a substantive right already lost by the plaintiff. *Link*, 73 F.2d at 152. The court also noted that the legislature did not intend for the amendment to apply retroactively. *Id.* at 151.

We find *Link* inapplicable in the present case because the Fourth Circuit decided that case in 1934 and, as discussed above, the Supreme Court has since made substantial changes in this area of the law. *Link* is based upon the same outdated principles upon which *Danzer* is based.

The district court's reliance upon *Dinh* is misplaced because in that case the appellant *agreed* that the statute of repose created substantive rights in the defendant which once vested could not be legislatively destroyed. *Dinh*, 974 F.2d at 501. Because the issue was not contested, it was not before the court.

The Trust relies upon *School Board of Norfolk v. United States Gypsum Co.*, 360 S.E.2d 325 (Va. 1987), in which the court found that retroactive application of a statute of repose violated the defendant's due process rights under the Virginia Constitution. Because the court decided *United States Gypsum Co.* under Virginia's Constitution, not the Federal Constitution, and because states are free to interpret their constitutions under a stricter standard than the federal courts interpret the Federal Constitution, we find *United States Gypsum Co.* inapplicable here.

The Trust also relies upon *Colony Hill Condominium I Ass'n v. Colony Co.*, 320 S.E.2d 273 (N.C. Ct. App. 1984), *review denied*, 325 S.E.2d 485 (N.C. 1985), in which the court held that a statute of repose provided the defendant with a vested right not to be sued and reviving a

liability already extinguished violated the defendant's due process rights. As a state appellate decision, *Colony Hill* is not binding authority on this court, and we decline to follow it because it does not recognize the recent changes in this area of the law triggered by the Supreme Court's decisions in *Turner Elkhorn* and *Pension Benefit*.

The recent developments in the law require us to apply the rational basis test in determining whether retroactive legislation violates the Due Process Clause of the Fifth Amendment. For purposes of constitutional analysis, the same test applies regardless of whether the statute at issue is one of repose or one of limitation.

Next, we must determine whether the Oregon statute of repose, which expressly states that it applies retroactively, serves a legitimate legislative purpose that is furthered by rational means. After extensive hearings on the legislation, the Oregon legislature determined that retroactive application of the Special IUD Statute was fair and equitable to all parties involved. Because many of the women suffered injuries from the IUD in the early to mid 1970s, and the link between the IUD and the injuries it caused was not discovered until the early 1980s, the unamended statute of repose barred the claims of many women. The Oregon Legislature determined that the Special IUD Statute was necessary to provide these claimants with a fair opportunity to litigate their claims. We find that the Special IUD statute does not violate the Due Process Clause of the Fifth Amendment because it is rationally related to a legitimate legislative purpose.

For the foregoing reasons, the opinion of the district court is

REVERSED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I would affirm on the opinion of the district court, the pertinent part of which opinion is copied below and which I adopt as my own. I would consider any of its particular language altered only enough to fit the changed circumstances of its use by me.

* * * *

Although the constitutional impediments to expressly retroactive legislation are "of limited scope," such legislation will not pass constitutional muster if it runs afoul of the Fourteenth Amendment by depriving a person of life, liberty, or property without due process of law. *See Landgraf v. USI Film Products*, 62 U.S.L.W. 4255, 4262, 128 L. Ed. 2d 229 (1994). It is undisputed that a legislature may in certain instances retroactively enlarge a statute of limitations without violating the Constitution. *International Union of Electrical, etc. v. Robbins & Myers, Inc.*, 429 U.S. 229, 243 (1976); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-12 (1945); *Campbell v. Holt*, 115 U.S. 620 (1885).[6/]

[6/] "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking

Retroactive enlargement in such a situation is unproblematic because "statutes of limitation go to matters of remedy, not to destruction of fundamental rights." *Chase*, 325 U.S. at 314. However, "where a statute in creating a liability also put[s] a period to its existence, a retroactive extension of the period after its expiration amount[s] to a taking of property without due process of law." *Id.*, at 311 n.8 (citing *William Danzer Co. v. Gulf & Ship Island R.R. Co.*, 268 U.S. 633, 636-37 (1925)). In *Danzer*, the Supreme Court refused to permit a plaintiff who failed to file timely under a two-year federal limitations period to take advantage of a later statute permitting suspension of the timeliness requirement in certain circumstances. The original statute had been previously determined, in other cases, to constitute not only a bar to a remedy, but also a destruction of defendant's liability to plaintiff. 268 U.S. at 636. Therefore, upon expiration of the two-year period for filing, "it was as if liability had never existed." *Id.* Thus by virtue of *Chase* and *Danzer*, the Supreme Court has distinguished between retroactive enlargement of statutes which effect only remedy and those which effect liability, upholding the former while refusing to uphold the latter.

> of life, liberty or property without due process of law. . . .Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment."

Chase, 325 U.S. at 315-16.

As both parties agree, the statute which has been retroactively enlarged in this case, ORS 30.905, is a statute of repose. Unlike a statute of limitations which generally runs from the time a cause of action accrues, the statute of repose in this case runs from the date the product was first purchased. As Judge Northrop explained in *Pottratz*, "this statute does not operate to bar a remedy; it prevents a cause of action from ever arising." 588 F. Supp. at 952. In other words, injury which occurs more than eight years after the product is purchased, "'forms no basis for recovery. The injured party literally has *no* cause of action.'" *Id.* (quoting *President and Directors of Georgetown College v. Madden*, 505 F. Supp. 557, 573 (D. Md. 1980), *aff'd in part and appeal dismissed in part*, 660 F.2d 91 (4th Cir. 1981)). The policies identified by Judge Northrop which underlay a statute of repose are "first, that there is a lack of reliability and availability of evidence after a lapse of a long period of time and secondly, that people are entitled to plan their affairs with certainty, free from the disruptive burden of protracted and unknown potential liability." *Id.* at 953 (citing *Johnson v. Star Machinery Co.*, 270 Or. 694 (1974)).

The Fourth Circuit has explained the differences between statutes of limitation, which are procedural, and statutes of repose, which are substantive.

> "Statutes of limitation . . . are primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability, although this may be their effect.
>
> In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for

> acts committed long ago. Statutes of repose make the filing of suit within a specified time a substantive part of plaintiff's cause of action.... In other words, *where a statute of repose has been enacted, the time for filing suit is engrafted onto a substantive right created by law.* The distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws. Statutes of repose are meant to be 'a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.'"

Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987) (footnotes omitted) (emphasis added) (citing *Bolick v. American Barmag Corp.*, 293 S.E.2d 415, 418 (N.C. 1982)), *cert. denied*, 487 U.S. 1218 (1988).

Danzer has never been overruled by the Supreme Court; rather later cases such as *Chase* and *Robbins & Myers* are testament to its continued vitality, since the opinions in those cases expressly distinguish themselves from the substantive impairment found in *Danzer*. Nonetheless, plaintiff argues that *Danzer* is no longer valid law and that the substance/procedure distinction drawn in that case is equally untenable. Plaintiff relies largely on *Wesley Theological Seminary of United Methodist Church v. United States Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).[7] In that case Wesley

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[7] Plaintiff also relies on *Independent School Dist. No. 197 v. W.R.*

sued Gypsum for providing Wesley with building tiles which contained asbestos. In defense, Gypsum asserted that Wesley's claim was time-barred because the injury alleged did not occur within ten years after the defective improvement to the property, as required under the District of Columbia's statute of repose. However, while the ,case was pending, an amendment to the time-bar statute provided that the statute was inapplicable to manufacturers such as Gypsum. Relying on the earlier time-bar statute, the district court granted partial summary judgment for Gypsum, reasoning that the statute of repose conferred upon Gypsum a substantive right not to be sued. The Court of Appeals reversed.

The D.C. Circuit rejected the defendant's argument that "changes in purely procedural provisions may be retroactive while changes in substantive ones may not." 876 F.2d at 121. The Court relied heavily *on Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976), and *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717 (1984), two Supreme Court cases which did not accept due process challenges to expressly retroactive statutes. Under those cases, retroactive economic legislation need only be justified by "a rational legislative purpose" to survive constitutional review. *Pension Benefit,* 467 U.S. at 730. According to the

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Grace & Co., 752 F. Supp. 286 (D. Minn. 1990), which cites to

and relies largely upon the D.C. Circuit's opinion in *Wesley.*

Thus, while the following discussion addresses the opinion in

Wesley, it is also applicable to *W.R. Grace.*

Court in *Wesley,* the import of *Usery and Pension Benefit* is that "any substance procedure dichotomy suggested by *Chase* is either completely defunct or, at the very most, establishes procedural rules as a safe harbor within which a legislature may freely make retroactive changes." 876 F.2d at 122. The Court in *Wesley,* acknowledged that "there are real distinctions between a statute of limitation and one of repose," but that "we need not tarry with these theoretical points. Even if they proved that statutes of repose were substantive it would not advance our resolution of the constitutional claim." *Id.* at 122-23.

Unlike the D.C. Circuit, however, the Fourth Circuit has not so rejected the distinction between substance and procedure. As the *Goad* case demonstrates, *see supra,* the Fourth Circuit views the differences between statutes of limitation and statutes of repose as corresponding "to the distinction between procedural and substantive laws." 831 F.2d at 511. Further, in the Fourth Circuit, the differences between those two types of timeliness statutes are not viewed as "metaphysical." *Wesley,* 876 F.2d at 122. Rather, the Court in *Goad* stated that,

> "this distinction does not exalt form over substance, nor does it subject the Constitution to the whims of the States in labeling their laws. . . . [T]he labels serve a useful purpose in describing the various interests underlying the two types of laws. 'The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid differences between rules in which stability is of prime

> importance and those in which flexibility is a more important value.'"

Id. (quoting *Chase*, 325 U.S. at 314).

Additionally, as defendant notes, the opinion in *Wesley* does not specifically mention the Supreme Court's decision in *Danzer*. In contrast to the D.C. Circuit, the Fourth Circuit has continued to adhere to the line initially drawn in *Danzer* and later upheld in *Chase*. In *Link v. Receivers of Seaboard Air Line Ry. Co.*, 73 F.2d 149, 152 (4th Cir. 1934), Judge Parker, partly in reliance on *Danzer*, stated that "where a right of recovery has been lost by reason of failure to institute action within the period limited as a condition of the right, it is not revived by a statute subsequently enacted extending the period." *Id.* at 152. Such a situation differs from a "repeal of a mere statute of limitations affecting the remedy." *Id.*

In its most recent statement concerning this issue, the Fourth Circuit again affirmed the principle stated in *Danzer*. In *Dinh v. Rust International Corp.*, 974 F.2d 500 (4th Cir. 1992), plaintiff was injured in an industrial accident in 1989 by a machine which had been installed in 1959. Virginia's statute of repose, enacted in 1964, provided that any action against a person responsible for an improvement to real property must be brought within five years after the allegedly defective improvement had been made. Later amendments to that statute provided that the statute's five-year limitation did not apply to manufacturers of machinery such as defendants. The district court granted summary judgment to defendants, reasoning that the 1964 statute of repose applied to the machinery and that therefore defendants "obtained *vested* rights of repose prior to enactment of the" amendments. *Id.* at 501. Although on appeal plaintiff did

"not argue for a retroactive application" of the amendments, the Fourth Circuit affirmed the district court's conclusion in that regard, stating that "the statute of repose creates *substantive* rights in potential defendants, which, once vested, may not be legislatively destroyed." *Id.* (citing *School Bd. of City of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32 (1987)).[8/] Thus, the Fourth Circuit appears to follow the substance/procedure distinction drawn by the Supreme Court to a considerably greater degree than the D.C. Circuit; this Court cannot and does not apply *Wesley's* approach.[9/]

Moreover, even if this Court were otherwise to consider the import *of Wesley,* without regard to the Fourth Circuit's caselaw, it would appear that the Supreme Court cases relied upon by the Court in *Wesley* do not bear directly on the narrow issue at hand. In *Usery,* the Supreme court approved retroactive application of a congressional statute which imposed a new liability upon coal mine operators for the death or illness of miners caused by coal dust, including those miners whose work terminated before passage of the act. In *Pension Benefit,* the Supreme court approved retroactive application of an act which amended parts of ERISA by placing retroactive liability upon employers who withdraw from multi-employer pension plans. The statutes

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8/ The plaintiff contended on appeal that the 1964 statute did not apply to the improvements completed prior to the enactment of that statute. The Fourth Circuit rejected that argument.

9/ *See also David v. Valley Distrib. Co.*, 522 F.2d 827, 830 n.7 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977) (explaining difference between *Danzer* and *Chase*); *Starks v. S.E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982) (same).

at issue in *Usery* and *Pension Benefit* established complex regulatory schemes "in the field of national economic policy." *Pension Benefit,* 467 U.S. at 729. In contrast, the Oregon Special IUD Statute relates principally to the timeliness aspect of state common law rights and duties which exist solely with regard to private parties. Thus, it would appear that the decision in *Danzer, Chase, and Robbins & Myers* deal more closely with the issue involved in this case. Accordingly, this Court relies upon *Danzer, Chase,* and *Robbins & Myers* without giving the effect suggested by *Wesley* to the broader statements contained in *Usery* and *Pension Benefit* - statements which themselves appear to pertain to different sorts of statutory schemes than those at issue in the within case.

Accordingly, in the light of Supreme Court caselaw and the Fourth Circuit statements on this issue, this Court holds that the Oregon Special IUD statute is unconstitutional. Under the Oregon Statute of Repose, Ms. Shadburne's claim is untimely and thus, defendant's motion for judgment on the pleadings will be granted in a separate Order of even date herewith.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SUSAN SHADBURNE	*	
V.	*	CIVIL NO. K-83-160
DALKON SHIELD CLAIMANTS TRUST	*	
	*	

Filed: May 19, 1994

Michael A. Pretl, Esquire and H. Robert Erwin, Esquire, Pretl & Erwin, P.A., of Baltimore, Maryland, for plaintiff.

Paul F. Strain, Esquire, Elizabeth C. Honeywell, Esquire and Dino S. Sangiamo, Esquire, Venable, Baetjer & Howard, of Baltimore, Maryland, for defendant.

KAUFMAN, Senior District Judge.

On March 1, 1974, plaintiff, Susan Shadburne, received a Dalkon Shield intrauterine contraceptive which was manufactured and sold by A. H. Robins, Inc. She filed suit in this Court on January 20, 1983, alleging that she had been injured by the use of the Dalkon Shield. At that latter date, the Oregon statute of repose, ORS 30.905, provided that "a product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption." On December 20, 1984, this Court granted Robins' motion for summary judgment with regard to Shadburne, holding that because plaintiff did not file suit within eight years of receiving her

Dalkon Shield, her suit was barred under the Oregon statute of repose. In re Dalkon Shield Cases, 599 F. Supp. 1351, 1356-57 (D. Md. 1984). The decision of Judge Northrop in those Dalkon Shield Cases was largely based on his earlier opinion in Pottratz v. Davis, 588 F. Supp. 949, 953 (D. Md. 1984), in which he held that "the Oregon statute is an ultimate statute of repose which is part of the substantive law of Oregon." Because Maryland applies the substantive law of the state in which a wrong occurs, and because the Oregon statute of repose is substantive, the court in Pottratz determined that under this Court's choice-of-law principles, the Oregon statute of repose governed a Dalkon Shield claim which arose in Oregon.

Shadburne, along with several other plaintiffs, appealed Judge Northrop's ruling in Dalkon Shield Cases to the United States Court of Appeals for the Fourth Circuit. On August 21, 1985, while that case was on appeal in that Court, Robins filed a petition for bankruptcy in the United States District Court for the Eastern District of Virginia, thus staying all of the Dalkon Shield litigation. During the continued pendency of Ms. Shadburne's appeal, Oregon enacted a statute providing that the Oregon State [sic] of Repose "shall not apply to a product liability civil action against a manufacturer of an intrauterine device, resulting in IUD-related injuries." Or. Laws 1989 c. 642 § 2 ("Special IUD Statute"). Instead, the statute provided that a plaintiff must file suit against an IUD manufacturer "not later than two years after the date on which the plaintiff discovered, or, in the exercise of reasonable care, should have discovered" her injury. § 3. The Act further provided that it applied to "any product liability civil action against a manufacturer of an intrauterine device currently pending in the trial court or

on appeal, in which the defendant manufacturer has raised the statute of limitations or repose as a defense." § 4.[10/]

In reliance upon the enactment of the Special IUD Statute, several Oregon claimants commenced an adversary proceeding against Robins in the aforementioned Bankruptcy Court. As stated in a Consent Order submitted to that

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10/ In 1987, the Oregon legislature exempted IUD cases from the statute of repose and provided in part that:

> Notwithstanding ORS 30.905, a product liability civil action against the manufacturer of an intrauterine contraceptive device shall be commenced not later than two years after the date on which the plaintiff first discovered, or in the exercise of reasonable care should have discovered, the injury and the cause of the injury.

Or. Laws 1987 c.4 § 5. The Act prescribed an outside date of July 1, 1989, for filing such actions, and also provided that actions which had been dismissed under ORS 30.905 could be refiled within one year of the effective date of the 1987 Act. §§ 7, 8. Further, actions against IUD manufacturers for IUD's purchased more than eight years before the effective date of the 1987 Act which had never been commenced could be filed within one year from the Act's effective date. § 9. According to plaintiff, because the Robins bankruptcy had not been resolved by the July 1, 1989 cutoff date, the Oregon legislature enacted the 1989 legislation.

Bankruptcy Court, the claimants were concerned that "any rights afforded them by the Oregon Special IUD Statute . . . not be lost due to the pendency of the automatic stay." On May 5, 1989, the said Bankruptcy Court signed the aforementioned Consent Order which provided: "The periods set forth in the Oregon Special IUD Statute for filing suit against Robins or the Trust on Dalkon Shield-related personal injury claims, if legal and applicable, are tolled until thirty days after expiration or termination of the automatic stay."

The Order also stated:

> "The Court expressly reserves judgment on any and all other issues arising from the referenced Oregon statues or which are and could have been raised in this adversary proceeding including, without limitation, issues relating to the constitutionality, validity, or enforceability of the Oregon Special IUD Statute or its retroactive effect. . ."

On December 13, 1989, this Court entered an order administratively closing all Dalkon Shield claims then pending, subject to a claimant's motion for reinstatement. Defendant emerged from bankruptcy on December 15, 1989.[11/] On October 23, 1991, the Fourth Circuit dismissed

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11/ Under the post-bankruptcy plan of reorganization, a Dalkon Shield Claimants Trust was created in which $2.3 billion was deposited for resolution of Dalkon

the Oregon claimants' appeal to which Shadburne had been a party because one of the co-appellants had settled her claim. Ms. Shadburne completed the Claims Resolution process without settling, and on October 21, 1992, the Bankruptcy Court certified plaintiff to proceed with litigation in this case. This Court granted plaintiff's motion to reinstate this case on October 30, 1992.

The Trust filed a motion for judgment on the pleadings on June 25, 1992, challenging the constitutionality of the Special IUD statute under the federal and Oregon constitutions. At a motions hearing held in chambers on December 15, 1993, this Court raised the question of whether it lacked jurisdiction over this case in the light of the Fourth Circuit's dismissal of the Oregon claimants' appeal. In a Memorandum and Order dated December 27, 1993, this Court stayed all proceedings in this case until counsel advised this Court concerning future presentation of that issue to the Fourth Circuit. On February 25, 1994, the Fourth Circuit determined that Ms. Shadburne's appeal had been dismissed in error, recalled its mandate, and remanded this case back to this Court, insofar as it relates to Ms. Shadburne. Accordingly, this Court must now decide defendant's motion for judgment on the pleadings, in connection with the issue of whether the Oregon Special IUD

Shield claims. In addition, a Claims Resolution Facility was established pursuant to which the Trust attempted to settle claims with individual claimants. Upon exhaustion of the Claims Resolution procedures, if a settlement agreement is not reached with an individual claimant, the Trust asks the Bankruptcy Court to certify that the claimant has completed the claims resolution process and may thereafter pursue litigation.

Statute, which expressly applies retroactively to revive claims extinguished by the prior Oregon Statute of Repose, is constitutional under the federal Constitution.[12/]

LAW

Although the constitutional impediments to expressly retroactive legislation are "of limited scope," such legislation will not pass constitutional muster if it runs afoul of the Fourteenth Amendment by depriving a person of life, liberty, or property without due process of law. See Landsgraf v. USI Film Products., 62 U.S.L.W. 4255, 4262, 128 L. Ed.2d 229 (1994). It is undisputed that a legislature may in certain instances retroactively enlarge a statute of limitations without violating the Constitution. International Union of Electrical, etc., v. Robbins & Myers, Inc., 429 U.S. 229, 243 (1976); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 311-12 (1945); Campbell v. Holt, 115 U.S. 620 (1885).[13/]

12/ In their Supplemental Memorandum, defendant states that if this Court desires to certify to the Oregon Supreme Court the question of the constitutionality of the Oregon statute under the Oregon constitution, defendant would like to drop its state constitutional challenge. Accordingly, in a Memorandum to Counsel dated May 4, 1994, this Court stated that it understood, for purposes of this case, that defendant is conceding the constitutionality of the Oregon statute under the Oregon constitution. Thus, the constitutionality of the statute under the Oregon constitution is not challenged in connection with defendants' pending motion.

13/ The Fourteenth Amendment does not make an act of state "legislation void merely because it has some

Retroactive enlargement in such a situation is unproblematic because "statutes of limitation go to matters of remedy, not to destruction of fundamental rights." Chase, 325 U.S. at 314. However, "where a statute in creating a liability also put[s] a period to its existence, a retroactive extension of the period after its expiration amount[s] to a taking of property without due process of law." Id., at 311 n.8 (citing William Danzer Co. v. Gulf & Ship Island R.R. Co., 268 U.S. 633, 636-37 (1925)). In Danzer, the Supreme Court refused to permit a plaintiff who failed to file timely under a two-year federal limitations period to take advantage of a later statute permitting suspension of the timeliness requirement in certain circumstances. The original statute had been previously determined, in other cases, to constitute not only a bar to a remedy, but also a destruction of defendant's liability to plaintiff. 268 U.S. at 636. Therefore, upon expiration of the two-year period for filing, "it was as if liability had never existed." Id. Thus, by virtue of Chase and Danzer, the Supreme Court has distinguished between retroactive enlargement of statutes which effect only remedy and those

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> retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment."
>
> Chase, 325 U.S. at 315-16.

which effect liability, upholding the former while refusing to uphold the latter.

As both parties agree, the statute which has been retroactively enlarged in this case, ORS 30.905, is a statute of repose. Unlike a statute of limitations which generally runs from the time a cause of action accrues, the statute of repose in this case runs from the date the product was first purchased. As Judge Northrop explained in Pottratz, "this statute does not operate to bar a remedy; it prevents a cause of action from ever arising." 588 F. Supp. at 952. In other words, injury which occurs more than eight years after the product is purchased, "'forms no basis for recovery. The injured party literally has no cause of action.'" Id. (quoting President and Directors of Georgetown College v. Madden, 505 F. Supp. 557, 573 (D. Md. 1980), aff'd in part and appeal dismissed in part, 660 F.2d 91 (4th Cir. 1981)). The policies identified by Judge Northrop which underlay a statute of repose are "first, that there is a lack of reliability and availability of evidence after a lapse of a long period time and secondly, that people are entitled to plan their affairs with certainty, free from the disruptive burden of protracted and unknown potential liability." Id. at 953 (citing Johnson v. Star Machinery Co., 270 Or. 694 (1974)).

The Fourth Circuit has explained the differences between statutes of limitation, which are procedural, and statutes of repose, which are substantive.

> "Statutes of limitation . . . are primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability, although this may be their effect.

> In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for acts committed long ago. Statutes of repose make the filing of suit within a specified time a substantive part of plaintiff's cause of action . . . . In other words, where a statute of repose has been enacted, the time for filing suit is engrafted onto a substantive right created by law. The distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws. Statues of repose are meant to be 'a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.'"

Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987) (footnotes omitted) (emphasis added) (citing Bolick v. American Barmag Corp., 293 S.E.2d 415, 418 (N.C. 1982)), cert. denied, 487 U.S. 1218 (1988).

Danzer has never been overruled by the Supreme Court; rather, later cases such as Chase and Robbins & Myers are testament to its continued vitality, since the opinion in those cases expressly distinguish themselves from the substantive impairment found in Danzer. Nonetheless, plaintiff argues that Danzer is no longer valid law and that the substance/procedure distinction drawn in that case is

equally untenable. Plaintiff relies largely on Wesley Theological Seminary of United Methodist Church v. United States Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989), cert. denied, 494 U.S. 1003 (1990).[14/] In that case, Wesley sued Gypsum for providing Wesley with building tiles which contained asbestos. In defense, Gypsum asserted that Wesley's claim was time-barred because the injury alleged did not occur within ten years after the defective improvement to the property, as required under the District of Columbia's statute of repose. However, while the case was pending, an amendment to the time-bar statute provided that the statute was inapplicable to manufacturers such as Gypsum. Relying on the earlier time-bar statute, the district court granted partial summary judgment for Gypsum, reasoning that the statute of repose conferred upon Gypsum a substantive right not to be sued. The Court of Appeals reversed.

The D.C. Circuit rejected the defendant's argument that "changes in purely procedural provisions may be retroactive while changes in substantive ones may not." 876 F.2d at 121. The Court relied heavily on Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) and Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984), two Supreme Court cases which did not accept due process challenges to expressly retroactive statutes. Under those cases, retroactive economic legislation need only be justified

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14/ Plaintiff also relies on Independent School Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286 (D. Minn. 1990), which cites to and relies largely upon the D.C. Circuit's opinion in Wesley. Thus, while the following discussion addresses the opinion in Wesley, it is also applicable to W.R. Grace.

by "a rational legislative purpose" to survive constitutional review. Pension Benefit, 467 U.S. at 730. According to the Court in Wesley, the import of Usery and Pension Benefit is that "any substance/procedure dichotomy suggested by Chase is either completely defunct or, at the very most, establishes procedural rules as a safe harbor within which a legislature may freely make retroactive changes." 876 F.2d at 122. The Court in Wesley acknowledged that "there are real distinctions between a statute of limitation and one of repose," but that "we need not tarry with these theoretical points. Even if they proved that statutes of repose were substantive it would not advance our resolution of the constitutional claim." Id. at 122-23.

Unlike the D.C. Circuit, however, the Fourth Circuit has not so rejected the distinction between substance and procedure. As the Goad case demonstrates, see supra, the Fourth Circuit views the differences between statutes of limitation and statutes of repose as corresponding "to the distinction between procedural and substantive laws." 831 F.2d at 511. Further, in the Fourth Circuit, the differences between those two types of timeliness statutes are not viewed as "metaphysical." Wesley, 876 F.2d at 122. Rather, the Court in Goad stated that,

> "this distinction does not exalt form over substance, nor does it subject the Constitution to the whims of the States in labeling their laws . . . [T]he labels serve a useful purpose in describing the various interests underlying the two types of laws. 'The abstract logic of the distinction between substantive rights and remedial or procedural rights may

> not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value.'"

Id. (quoting Chase 325 U.S. at 314).

Additionally, as defendant notes, the opinion in Wesley does not specifically mention the Supreme Court's decision in Danzer. In contrast to the D.C. Circuit, the Fourth Circuit has continued to adhere to the line initially drawn in Danzer and later upheld in Chase. In Link v. Receivers of Seaboard Air Line Ry. Co., 73 F.2d 149, 152 (4th Cir. 1934), Judge Parker, partly in reliance on Danzer, stated that "where a right of recovery has been lost by reason of failure to institute action within the period limited as a condition of the right, it is not revived by a statute subsequently enacted extending the period." Id. at 152. Such a situation differs from a "repeal of a mere statute of limitations affecting the remedy." Id.

In its most recent statement concerning this issue, the Fourth Circuit again affirmed the principle stated in Danzer. In Dinh v. Rust International Corp., 974 F.2d 500 (4th Cir. 1992), plaintiff was injured in an industrial accident in 1989 by a machine which had been installed in 1959. Virginia's statute of repose, enacted in 1964, provided that any action against a person responsible for an improvement to real property must be brought within five years after the allegedly defective improvement had been made. Later amendments to that statute provided that the statute's five-year limitation did not apply to manufacturers of machinery such as

defendants. The district court granted summary judgment to defendants, reasoning that the 1964 statute of repose applied to the machinery and that therefore defendants "obtained vested rights of repose prior to enactment of the" amendments. Id. at 501. Although on appeal plaintiff did "not argue for a retroactive application" of the amendments, the Fourth Circuit affirmed the district court's conclusion in that regard, stating that "the statute of repose creates substantive rights in potential defendants, which, once vested, may not be legislatively destroyed." Id. (citing School Bd. of City of Norfolk v. U.S. Gypsum Co., 234 Va. 32 (1987)).[15/] Thus, the Fourth Circuit appears to follow the substance/procedure distinction drawn by the Supreme Court to a considerably greater degree than the D.C. Circuit; this Court cannot and does not apply Wesley's approach.[16/]

Moreover, even if this Court were otherwise to consider the import of Wesley without regard to the Fourth Circuit's caselaw, it would appear that the Supreme Court cases relied upon by the Court in Wesley do not bear directly on the narrow issue at hand. In Usery, the Supreme Court approved retroactive application of a congressional statute which imposed a new liability upon coal mine operators for the death or illness of miners caused by coal dust, including

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15/ The plaintiff contended on appeal that the 1964 statute did not apply to the improvements completed prior to the enactment of that statute. The Fourth Circuit rejected that argument.

16/ See also Davis v. Valley Distrib. Co., 522 F. 2d 827, 830 n.7 (9th Cir. 1975), cert. denied, 429 U.S. 1090 (1977) (explaining difference between Danzer and Chase); Starks v. S.E. Rykoff & Co., 673 F.2d 1106, 1109 (9th Cir. 1982) (same).

those miners whose work terminated before passage of the act. In Pension Benefit, the Supreme Court approved retroactive application of an act which amended parts of ERISA by placing retroactive liability upon employers who withdrew from multi-employer pension plans. The statutes at issue in Usery and Pension Benefits established complex regulatory schemes "in the field of national economic policy." Pension Benefits, 467 U.S. at 729. In contrast, the Oregon Special IUD Statute relates principally to the timeliness aspect of state common law rights and duties which exist solely with regard to private parties. Thus, it would appear that the decisions in Danzer, Chase, and Robbins & Myers deal more closely with the issue involved in this case. Accordingly, this Court relies upon Danzer, Chase, and Robbins & Myers without giving the effect suggested by Wesley to the broader statements contained in Usery and Pension Benefit -- statements which themselves appear to pertain to different sorts of statutory schemes than those at issue in the within case.

Accordingly, in the light of Supreme Court caselaw and the Fourth Circuit statements on this issue, this Court holds that the Oregon Special IUD statute is unconstitutional. Under the Oregon Statute of Repose, Ms. Shadburne's claim is untimely and thus, defendant's motion for judgment on the pleadings will be granted in a separate Order of even date herewith.

/s/ Frank A. Kaufman

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SUSAN SHADBURNE	*	
V.	*	CIVIL NO. K-83-160
DALKON SHIELD CLAIMANTS TRUST	*	

ORDER

Judgment is hereby entered for defendant. It is so ORDERED this 19th day of May 1994.

/s/ Frank A. Kaufman

Senior United States District Judge

FILED: February 25, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1189

SUSAN SHADBURNE,

Plaintiff-Appellant,

versus

HUGH J. DAVIS, M.D.; DALKON SHIELD CLAIMANTS TRUST

Defendants-Appellees.

ORDER

We have before us the motion of Mrs. Shadburne to recall our mandate in this case, which dismissed her appeal with prejudice, and the response of the Dalkon Shield Claimants Trust opposing the motion.

After an examination of the papers submitted in this case and those in the court's files, we are of opinion that Mrs. Shadburne's appeal was dismissed in error. The error occurred because Mrs. Shadburne's appeal was taken with that of Mrs. Toliver and this appeal was consolidated for briefing and oral argument with that of Mrs. Pottratz, No. 84-2004. Mrs. Toliver settled with the Trust and moved this court for an order of voluntary dismissal with prejudice in her case. Mrs. Shadburne never settled with the Trust. Because Mrs. Toliver's was the lead case, forty-two of the appeals taken with hers were mistakenly dismissed with prejudice in this court's order filed on October 24, 1991. We therefore find that the interests of justice require that we recall our mandate in the case only insofar as it includes Mrs. Shadburne, vacate our order of dismissal only insofar as it includes Mrs. Shadburne, and remand Mrs. Shadburne's case to the district court.

Also, in considering the interests of justice we consider the following. Although we do not have the papers before us that we would have in a direct appeal of the district court's order of December 27, 1993 staying all proceedings in this case, and we do not intimate that the said interlocutory order is appealable, absent something else the papers before us are sufficient to show that there is no bar to the district court proceeding in this case. The Trust requested that the United States Bankruptcy Court certify Mrs. Shadburne's claim for further litigation, which the bankruptcy court did on October 31, 1992, one year after our dismissal order. The Trust now raises in the district court the effect of our dismissal with prejudice on Mrs. Shadburne's claim, which it could have raised in the bankruptcy court prior to its said order of October 31, 1992. Dismissals with prejudice are subject to the usual rules of res judicata, which is an affirmative defense and must be pleaded or it is waived. Fed.

R. Civ. P. 8(c); 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2367 (1971). Res judicata, even in the dismissal with prejudice context, does not affect the jurisdiction of the district court. Rogin v. Bensalem Township, 616 F.2d 680, 684 n.11 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981).

It is accordingly ADJUDGED and ORDERED that the mandate in this case is recalled only insofar as it includes Mrs. Shadburne, and our said order of dismissal of October 24, 1991 is vacated only insofar as it includes Mrs. Shadburne. It is further ORDERED that Mrs. Shadburne's case be remanded to the United States District Court for the District of Maryland for further proceedings consistent with the bankruptcy court's October 31, 1992 order certifying Mrs. Shadburne's claim to proceed with litigation.

With the concurrence of Judge Chapman.

/s/ H. E. Widener, Jr.

For the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SUSAN SHADBURNE *

V. * CIVIL NO. K-83-160

DALKON SHIELD *
CLAIMANTS TRUST

MEMORANDUM AND ORDER

(1) The question has arisen as to whether this Court has jurisdiction in this case at this time to entertain a quest for relief by plaintiff concerning the status of the Fourth Circuit's Order of October 23, 1991, filed October 24, 1991, in this Court, and reflected in the docket sheet of this Court as of the date of October 28, 1991. In the context of the record in this case, this Court concludes that a final judgment was entered by the Fourth Circuit in October 1991, reflecting the termination in that Court of the judicial process in this case as of that date.

(2) Counsel for plaintiff has indicated that the dismissal by the Fourth Circuit in October 1991 of the appeal in this case was specifically not intended by plaintiff-appellant to disturb in any way the coverage of the applicable Oregon statute and of the then applicable existing Orders and the then possible future Orders (future in relation to October 1991) of the Bankruptcy Court. In that context, it is to be noted that in this case 42 appeals were filed by 42 different appellants, one of whom was plaintiff-appellant, and that the said 42 appeals were filed at the same time. Those appeals were filed from one Order in this case of Judge Northrop of

this Court to the Fourth Circuit. Subsequently, in October of 1991, one or more of those appeals, including the appeal of plaintiff, was dismissed by the Fourth Circuit, with prejudice. However, plaintiff takes the position that plaintiff had no intention of dismissing her appeal, with prejudice, and that the majority of the said 42 appeals were not dismissed with prejudice.

(3) Counsel for defendant, as of this date, takes the position that the record speaks for itself concerning what occurred in the Fourth Circuit and in this Court at one or more times including in October 1991, and reserves the right to take the position that a final Order exists in this case, that the judicial process has ended on a final basis, that plaintiff may not proceed further in this case and that that status should not be altered.

(4) Under the circumstances, in view of the existing record in the Fourth Circuit and in this Court, this Court is faced with what it presently construes to be a final October 1991, Order of the Fourth Circuit. If that status is not to prevail and to continue, it is the further present view of this Court that plaintiff must seek any relief plaintiff desires to obtain in the Fourth Circuit, and not in this Court. This Court understands that counsel on both sides also adopt that latter view and are in agreement with this Court that the best possible procedure is for the plaintiff promptly to seek clarification and relief in the Fourth Circuit if plaintiff desires to obtain any further relief in this case.

(5) Accordingly, this Court hereby stays all further action in this case in this Court until further advice from counsel on both sides in this case concerning future presentation to and action by the Fourth Circuit. This Court

requests that counsel on both sides file a joint written status report concerning the same by January 31, 1994.

(6) Copies of this Memorandum and Order are being mailed today to counsel of record.

(7) It is so ORDERED this 27th day of December, 1993.

/s/ Frank A. Kaufman

Senior United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 24, 1991

No. 85-1189

ADA JUNE TOLIVER; MAYLENE M. RICE; GERALD RICE; NANCY ROXBERG; DALE WALDO ROXBERG; SHIRLEY A. BAXTER; ROSELL MCGUFFIN; DAVID HARRY MCGUFFIN; DE ANN WELLER; NANCY RADIUS; DONALD MCCLOUD; MARGARET E. WITCHER; ROBIN GUARIGLIA; RALPH DAVID GUARIGLIA; CAROL JOHNSON; CURT R. JOHNSON; LINDA M. LAUDER; HAROLD LAUDER; SANDRA K. MCGRATH; RONALD MCGRATH; SUSAN SHADBURNE-VINTON; WILLIAM G. VINTON; ANN PINDAR; LAWRENCE PINDAR; GLORIA J. WAITS; DOUGLAS WAITS; VAL LAYCOCK-COWLES; DOUGLAS COWLES; DARLA J. CHANDLER; THOMAS CHANDLER; CAROL LYNN LUXFORD; DENNIS LYNN LUXFORD; SUSAN D. DIAMOND; ROBERT DIAMOND; NANCY ELAINE HAMILTON; BRUCE B. HAMILTON; SHERRI JANE HOWELL-COLEMAN; LIONEL COLEMAN; KATHY PHILPOTT; JUDITH HOY; LARRY K. HOY; GEORGIA C. MILLER

Plaintiffs - Appellants

v.

HUGH J. DAVIS, M.D.; DALKON SHIELD CLAIMANTS TRUST

Defendants - Appellees

ORDER

The parties have filed a stipulation of dismissal.

The Court dismisses this appeal pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, and each of the parties will bear their own costs. The Clerk of this Court will issue a certified copy of this order to the Clerk of the District Court as and for the mandate.

For the Court,

JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: DALKON SHIELD CASES	*	
ARLENE G. MADILL		M 82-3789
ADA JUNE TOLLIVER	*	B 82-3790
LINDA J. & ROY E. BLAIR		HM 82-3791
MAYLENE M. & GERALD RICE	*	HM 82-3792
NANCY & DALE WALDO ROXBERG		B 83-18
SHIRLEY A. BAXTER	*	JH 83-19
ROSELLA & DAVID HARRY McGUFFIN		K 83-20
DE ANN WEILER	*	M 83-21
NANCY RADIUS & DONALD McCLOUD		M 83-22
MARGARET E. WITCHER	*	HM 83-23
ROBIN & RALPH DAVID GUARIGLIA		M 83-155
CAROL & CURT R. JOHNSON	*	JH 83-157
LINDA M. & HAROLD LAUDER		B 83-158
SANDRA K. & RONALD McGRATH	*	HM 83-159
SUSAN SHADBURNE-VINTON & WILLIAM G. VINTON	*	M 83-160
ANN & LAWRENCE PINDAR		HM 83-161
CINDY A. & RICHARD HAVICE	*	M 83-162
GLORIA J. & DOUGLAS WAITS		HM 83-164
VAL & DOUGLAS LAYCOCK-COWLES	*	HM 83-165
DARLA & THOMAS CHANDLER		M 83-167
CAROL LYNN & DENNIS LYNN LUXFORD	*	HM 83-168
SUSAN D. & ROBERT DIAMOND	*	JH 83-169
NANCY ELAINE & BRUCE B. HAMILTON	*	B 83-1066

CAROLYN & RONALD MAXTED		M 83-1713
SHERRI JANE & LIONEL HOWELL-COLEMAN	*	B 83-2795
KATHY PHILPOTT	*	JH 83-4215
JUDITH & LARRY K. HOY		H 83-4216
GEORGIA C. MILLER	*	H 83-4328
Plaintiffs	*	
v.	*	
A. H. ROBINS COMPANY and HUGH J. DAVIS, M.D.	*	
Defendants	*	

Filed: December 20, 1984

Michael A. Pretl, Esquire and Pretl & Schultheis, of Baltimore, Maryland, counsel for the plaintiffs.

Charles P. Goodell, Jr., Esquire, Susan T. Preston, Esquire, and Richard M. Barnes, Esquire, all of Semmes, Bowen & Semmes, of Baltimore, Maryland, counsel for defendant A.H. Robins Company; Deborah E. Jennings, Esquire and Piper & Marbury, of Baltimore, Maryland, counsel for defendant Hugh J. Davis, M.D.

NORTHROP, Senior United States District Judge

MEMORANDUM

On June 1, 1984, this Court granted summary judgment in Pottratz v. Davis, ___ F. Supp. ___, No.

HM 83-163 (D.Md., filed June 1, 1984) on the grounds that the action was barred by an Oregon statute of repose, ORS § 30.905, and by the doctrine of res judicata. On August 15, 1984, plaintiffs' motion for reconsideration en banc was denied, and counsel was directed to identify other pending actions in this Court which may be subject to summary judgment in accordance with the June 1, 1984 opinion and order.

On September 13, 1984, by joint memorandum, the defendants designated 28 additional actions in which they argue summary judgment should be entered on the dual grounds that: (1) all claims therein are barred by the Oregon statute of repose, and (2) prior judgments in 15 of these actions also bar the claims under the doctrine of res judicata. Plaintiffs filed a memorandum in opposition and defendants have replied. No hearing is necessary. Local Rule 6.

In order to facilitate discussion and to promote clarity, the 28 cases are arranged in three groups. The first group, comprising 15 actions, involves plaintiffs who have had summary judgment entered against them in the United States District Court for the District of Oregon on the ground that each claim was time-barred under ORS § 30.905. The second group contains seven cases that, while not barred by res judicata, are nevertheless time-barred under ORS § 30.905. One case, discussed in a footnote in this second group, contains a material issue of fact. The third and final group of cases involves plaintiffs in five actions where there are allegations implicating multiple states and raising questions regarding the applicability of the Oregon statute.

I.

In 15 actions the United States District Court for the District of Oregon entered summary judgment against the plaintiffs on the basis of *ORS § 30.905*. As the Pottratz opinion noted, the summary judgment entered by Judge Belloni in those cases is a final adjudication on the merits and bars a relitigation of the underlying facts. Pottratz v. Davis, ___ F. Supp. ___, ___, No. HM 83-163, slip op. at 9-10 (D.Md., filed June 1, 1984) (hereinafter sometimes referred to as the "Pottratz opinion"). This same conclusion applies with equal force to and is completely dispositive of the following actions where summary judgment has already been entered: Tolliver (B 82-3790); Rice (HM 82-3792); Roxberg (B 83-18); McGuffin (K 83-20); Radius (M 83-22); Witcher (HM 83-23); Guariglia (M 83-155); Lauder (B 83-158); McGrath (HM 83-159); Pindar (HM 83-161); Waits (HM 83-164); Laycock-Cowles (HM 83-165); Chandler (M 83-167); Luxford (HM 83-168); and Philpott (JH 83-4215).[17/]

Plaintiffs attempt to avoid res judicata by arguing that their respective facts are different than those in Pottratz, and thus, the Oregon statute of repose is inapplicable. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment at p. 5. The answer to this argument is that in each case, plaintiff had an opportunity to litigate her facts before the United States District Court for the District of Oregon. After reviewing those facts, Judge Belloni ruled

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17/ See Exhibits A-N to Defendants' Joint Memorandum in Support of Summary Judgment. Those exhibits are copies of Judge Belloni's order granting summary judgment against plaintiffs in the above-listed cases.

the actions time-barred under ORS § 30.905 and held: "There are no factors which require a result different from Philpott v. A.H. Robins Co., Inc., [710 F.2d 1422 (9th Cir. 1983)], and Dortch v. A.H. Robins Co., Inc., 59 Or. App. 310, 659 P.2d 1046 (1982)." This res judicata bar precludes plaintiffs from having a second chance at raising an argument concerning the applicability of ORS § 30.905.

By separate Order, summary judgment will be granted in favor of defendants in the above-listed cases.

II.

In Pottratz, this Court concluded that Oregon statute ORS § 30.905 is an ultimate statute of repose and that no cause of action accrues unless a plaintiff learns of a causal connection between her injuries and the Dalkon Shield within eight years of its purchase. Pottratz v. Davis, ___ F. Supp. ___, ___, No. HM 83-163, slip op. at 8 (D.Md., filed June 1, 1984). Application of this principle to the seven cases discussed below reveals that all are time-barred by the Oregon statute.

Plaintiffs object to the application of the Oregon statute by arguing that while they may not have made a connection between the Dalkon Shield and their injuries within the appropriate time frame, there are allegations of physical injury within the eight-year period set forth in ORS § 30.905. Plaintiffs argue further that these allegations of physical injury distinguish all other cases from Pottratz, and give rise to a factual dispute as to when the injury actually occurred.

The plaintiffs' argument does not withstand legal analysis. It is true that the below-discussed cases differ from

Pottratz in that there are allegations of physical injury occurring prior to the expiration of the eight-year period; occurrence of physical injury, alone, however, is not enough -- the injury which must occur within the eight-year period is the legal injury, i.e., "a physical injury which the plaintiff knows or as a reasonable person should know was caused by the defendant." Dortch v. A.H. Robins Co., Inc., 59 Or. App. 310, 650 P.2d 1046, 1051 (1982); Philpott v. A.H. Robins Co., Inc., 710 F.2d 1422, 1425 (9th Cir. 1983). "If plaintiff does not discover the defendant's causal connection until after the eighth year, no cause of action accrues within eight years and the claim is barred." Dortch, 650 P.2d at 1052-53; Philpott, 710 F.2d at 1425. Thus, the question is not when a physical injury is alleged to have occurred, but, rather, when the "legal injury" -- the causal connection -- is alleged to have been discovered.

This is clearly the sense in which "injury" was used in the Pottratz opinion. See, Pottratz v. Davis, ___ F. Supp. ___, ___, No. HM 83-163, slip op. at 8 (D.Md., filed June 1, 1984). Indeed, this conclusion is buttressed by the fact that in both the underlying decisions of Pottratz, Dortch and Philpott, there were allegations of physical injury within the eight-year period. Dortch, 650 P.2d at 1047 and Philpott, 710 F.2d at 1425. The allegations were not deemed legally significant because plaintiffs did not "discover the causal connection [between their injuries and the Dalkon Shield] until after the eighth year . . ." Dortch, 650 P.2d at 1052-53; Philpott, 710 F.2d at 1425.

As stated, application of this legal injury analysis and ORS § 30.905 to the undisputed facts of the cases discussed below, reveals that the defendants are entitled to summary judgment as a matter of law.

1. Johnson, JH 83-157

The following facts are undisputed: Plaintiff, a resident and citizen of Oregon, purchased and inserted the Dalkon Shield on August 17, 1971. Complaint ¶¶ 1, 29. Physical disorder or injury was experienced in June, 1972 and September, 1978. Complaint ¶¶ 30, 32. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until August, 1980 (Complaint ¶ 38), more than eight years after purchase.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905 and as discussed above, plaintiff's claims are time-barred.[18/]

2. Diamond, JH 83-169

The following facts are undisputed: Plaintiff, a resident and citizen of Oregon, purchased and inserted the Dalkon Shield in May, 1971. Complaint ¶¶ 1, 29. Physical disorder or injury was experienced in March, 1972 and September, 1976. Complaint ¶¶ 30, 31. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until April, 1981 (Complaint ¶ 36), more than eight years after purchase.

18/ Johnson is one of three cases pending in the District of Oregon, without final disposition. The other cases are Baxter, JH 83-19, and Diamond, JH 83-169.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.

3. Hamilton, B 83-1066

The following facts are undisputed: Plaintiff, a resident and citizen of Oregon, purchased and inserted the Dalkon Shield in June, 1972. Complaint ¶ 1, 28. Physical disorder or injury was experienced in June and July, 1976. Complaint ¶¶ 29, 30. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until 1981 (Complaint ¶ 34), more than eight years after purchase.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.

4. Howell-Coleman, B 83-2795

The following facts are undisputed: Plaintiff, a resident and citizen of Oregon, purchased and inserted the Dalkon Shield on April 1, 1972. Complaint ¶¶ 1, 34. Physical disorder or injury was experienced in April, 1972 and August, 1978. Complaint ¶ 36. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until September, 1980 (Complaint ¶ 40), more than eight years after purchase.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.

5. Hoy, H 83-4216

The following facts are undisputed: Plaintiff, a resident and citizen of Oregon, purchased and inserted the Dalkon Shield on June 23, 1972. Complaint ¶¶ 1, 34. Physical disorder or injury was experienced in August, 1973. Complaint ¶¶ 37-39. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until early 1983 (Complaint ¶ 41), more than eight years after purchase.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.

6. Miller, H 83-4328

The following facts are undisputed: Plaintiff, a citizen and resident of Oregon, purchased and inserted the Dalkon Shield on March 13, 1973. Complaint ¶¶ 1, 33. Physical disorder or injury was experienced in 1974 and 1976. Complaint ¶¶ 35-37. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until October, 1983, more than eight years after purchase.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.

7. Baxter, JH 83-19

The following facts are undisputed: Plaintiff, a citizen and resident of Oregon, purchased and inserted the Dalkon Shield on June 23, 1972. Complaint ¶¶ 1, 28. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until "the summer of 1980." Complaint ¶ 33. Plaintiff admits in her brief in opposition to

the summary judgment motion filed in the District of Oregon litigation that "only after the eight year period of ORS § 30.905 had run that she discovered defendant's causal involvement in her injury." Exhibit O Defendant's Memorandum in Support of Summary Judgment at p. 2.

Since no legal injury occurred within eight years of purchase, as required by ORS § 30.905, plaintiff's claims are time-barred.[19/]

It should be noted at this juncture that application of the legal injury analysis to the 15 cases determined ante to be barred by res judicata would produce the same results. Every one of the fifteen cases alleges knowledge of the causal connection between the Dalkon Shield and plaintiffs' injuries outside of the eight-year period.

III.

The final group of cases is comprised of five actions in which Oregon is but one of two states mentioned by plaintiffs in their complaints. The issues to be determined in

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19/ One other case that logically belongs in this second group is Blair, HM 82-3791. Defendants argue that Ms. Blair learned of the causal connection between her injuries and the Dalkon Shield in "the summer of 1980, more than eight years after purchase." Defendants' Joint Memorandum at p. 13. Nothing in the record of Blair supports that factual allegation. Accordingly, a material fact, i.e. the date of legal injury, remains in dispute, and summary judgment in Blair is inappropriate at this time.

these cases are whether the substantive law of Oregon applies and, if so, whether ORS § 30.905 bars the suit under the legal principles discussed and applied above. In order to address these issues, the facts of each case must be analyzed.

1. Weiler, M 83-21

The following facts are undisputed: The Dalkon Shield was purchased and inserted on March 8, 1973 in Eugene, Oregon. Complaint ¶¶ 1, 28. After physical complications, the Dalkon Shield was removed in July, 1974 in Eugene, Oregon. Complaint ¶ 29. In July, 1981, more than eight years after purchase, plaintiff alleges she first became aware of the nature and cause of her injuries while hospitalized in Milwaukie, Oregon. Complaint ¶¶ 31, 34. Plaintiff is now a citizen and resident of Colorado. Complaint ¶ 1.

Defendants argue that the present residence in Colorado is immaterial, that Oregon law applies, and that ORS § 30-905 bars this suit. This Court agrees. "The injury [to plaintiff] occurred in Oregon because that is where the Dalkon Shield was inserted and used by the plaintiff." Pottratz v. Davis, ___ F. Supp. ___, ___, No. HM 83-163, slip op. at 9 (D.Md., filed June 1, 1984). Thus, the substantive law of Oregon applies.

Since plaintiff did not discover the causal connection between her injuries and the Dalkon Shield within the eight-year period mandated by ORS § 30.905, plaintiff's claims are time-barred.

2. Shadburne-Vinton, M 83-160

The following facts are undisputed: Plaintiff, a citizen and resident of Oregon, purchased and inserted the second of two Dalkon Shields on March 1, 1974, in Portland, Oregon. Complaint ¶¶ 1, 29. Physical injury or disorder was experienced in March, 1974, December, 1976, and January, 1977, in Portland, Oregon. Complaint ¶¶ 31, 33. Plaintiff has been employed in Portland, Oregon since at least 1976. Complaint ¶ 36. Plaintiff did not discover the causal connection between her injuries and the Dalkon Shield until she was "hospitalized at Cedars-Sinai Hospital in Los Angeles, California, between March 30 and April 4, 1982, with a diagnosis of chronic salpingitis." Complaint ¶ 38.

Plaintiff argues that she "was injured and treated in California, and as the Pottratz opinion did not consider the effect out-of-state treatment might have on the determination of the place of injury, summary judgment pursuant to Pottratz is inappropriate." Plaintiff's Memorandum in Opposition to Summary Judgment at p. 7.

The cause of action in this case arose in Oregon "because that is where the Dalkon Shield was inserted and used by the plaintiff." Pottratz v. Davis, supra, slip op. at 9. Oregon law applies, and ORS § 30.905 bars this suit since no legal injury occurred within eight years of purchase of the Dalkon Shield. The fact that plaintiff discovered the causal connection between her injuries and the Dalkon Shield while in California on March 30, 1982, beyond the eight-year period, is immaterial. Her later discovery cannot toll the statute or revive claims already barred.

3. Madill, M 82-3789

4. Havice, M 83-162

5. Maxted, M 83-1713

In the remaining cases, the Dalkon Shield was purchased and inserted outside the State of Oregon.[20/] Pottratz differs significantly from these cases because in Pottratz, "the injury to Mrs. Pottratz occurred in Oregon because that is where the Dalkon Shield was inserted and used by the plaintiff." Pottratz v. Davis, supra, slip. op. at 9 (emphasis added). Plaintiffs thus contend that Pottratz is not controlling because every event in these cases did not occur in Oregon. Defendants recognize this distinction but argue that Oregon law is still applicable because every event subsequent to purchase, including use, physical injury and discovery of causal connection, occurred in Oregon.

The conceptual problem in these cases is not "when" the injury occurred, but rather "where" the legal injury occurred. If the legal injury is deemed to have occurred in Oregon, these cases are barred by ORS § 30.905 because in each one, plaintiff did not discover a causal connection between her injuries and the Dalkon Shield within eight years. If, on the other hand, the legal injury occurred in the states where the Dalkon Shield was purchased and inserted, ORS § 30.905 is not applicable and will not bar these suits.

20/ The Dalkon Shield was purchased and inserted by plaintiff Madill in Florida, by plaintiff Havice in Montana, and by plaintiff Maxted in California.

Since Pottratz dealt only with the issue of when, not where, the legal injury arose, this Court holds, as plaintiffs suggested, that Pottratz is not controlling in these cases. There still remains an issue as to where the legal injury arose. Resolution of that issue will require analysis of more facts than are stated in the instant complaints, as well as a choice of law analysis as between Oregon law and that of the state of purchase. Accordingly, with respect to Madill, Havice and Maxted, defendants' motion for summary judgment will be denied, without prejudice, subject to renewal at the appropriate time.

IV.

In conclusion, language from the Pottratz decision is appropriate:

> Plaintiffs' losses are recognized and regretted by this Court. This Court further recognizes that other Dalkon Shield plaintiffs will be able to maintain actions in this Court, yet the instant plaintiffs will not. However, it is simply an unfortunate by-product of our federal-state system and the Erie doctrine that victims of common disasters and users of the same or similar products may be treated differently because of varying state laws.

Id., slip op. at 15.

A separate Order confirming the within rulings will be entered.

/s/

Edward S. Northrop
Senior United States District Judge

Dated: 20 December 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: DALKON SHIELD CASES	*	
ARLENE G. MADILL		M 82-3789
ADA JUNE TOLLIVER	*	B 82-3790
LINDA J. & ROY E. BLAIR		HM 82-3791
MAYLENE M. & GERALD RICE	*	HM 82-3792
NANCY & DALE WALDO ROXBERG		B 83-18
SHIRLEY A. BAXTER	*	JH 83-19
ROSELLA & DAVID HARRY McGUFFIN		K 83-20
DE ANN WEILER	*	M 83-21
NANCY RADIUS & DONALD MCLOUD		M 83-22
MARGARET E. WITCHER	*	HM 83-23
ROBIN & RALPH DAVID GUARIGLIA		M 83-155
CAROL & CURT R. JOHNSON	*	JH 83-157
LINDA M. & HAROLD LAUDER		B 83-158
SANDRA K. & RONALD McGRATH	*	HM 83-159
SUSAN SHADBURNE-VINTON & WILLIAM G. VINTON	*	M 83-160
ANN & LAWRENCE PINDAR		HM 83-161
CINDY A. & RICHARD HAVICE	*	M 83-162
GLORIA J. & DOUGLAS WAITS		HM 83-164
VAL & DOUGLAS LAYCOCK-COWLES	*	HM 83-165
DARLA & THOMAS CHANDLER		M 83-167
CAROL LYNN & DENNIS LYNN LUXFORD	*	HM 83-168
SUSAN D. & ROBERT DIAMOND	*	JH 83-169
NANCY ELAINE & BRUCE B. HAMILTON	*	B 83-1066
CAROLYN & RONALD MAXTED		M 83-1713
SHERRI JANE & LIONEL HOWELL-COLEMAN	*	B 83-2795
KATHY PHILPOTT	*	JH 83-4215

JUDITH & LARRY K. HOY		H 83-4216
GEORGIA C. MILLER	*	H 83-4328
Plaintiffs	*	
v.	*	
A. H. ROBINS COMPANY and HUGH J. DAVIS, M.D.	*	
Defendants	*	

ORDER

The Memorandum of Judge Northrop filed herewith having been considered by each of the nine judges of this Court who have Dalkon Shield cases pending before them; and each of the undersigned judges having further considered the memoranda filed by the parties herein; and the undersigned judges having all agreed with the findings and conclusions reached by Judge Northrop in the attached Memorandum; and each of the undersigned judges having further determined that Judge Northrop's rulings should be applied in the cases listed herein; IT IS, this 20th day of December, 1984, by the United States District Court for the District of Maryland, ORDERED;

1. That the joint motion for summary judgment filed by defendants A.H. Robins Co. and Hugh J. Davis, M.D., BE, and the same hereby IS, GRANTED, in the following cases:

a. Tolliver, B 82-3790
b. Rice, HM 82-3792
c. Roxberg, B 83-18
d. Baxter, JH 83-19
e. McGuffin, K 83-20
f. Weiler, M 83-21
g. Radius, M 83-22
h. Witcher, HM 83-23

i. Guariglia, M 83-155
k. Lauder, B 83-158
m. Shadburne-Vinton, M 83-160
o. Waits, HM 83-164
q. Chandler, M 83-167
r. Luxford, HM 83-168
t. Hamilton, B 83-1066
v. Philpott, JH 83-4125
w. Hoy, H 83-4216
j. Johnson, JH 83-157
l. McGrath, HM 83-159
n. Pindar, HM 83-161
p. Laycock-Cowles, HM 83-165
s. Diamond, JH 83-169
u. Howell-Coleman, B 83-2795
x. Miller, H 83-4328

2. That judgment BE, and the same hereby IS, ENTERED in favor of the defendants against the plaintiffs in the above-listed actions;

3. That the Clerk of Court enter the above-listed cases as CLOSED on the Court's docket;

4. That the joint motion for summary judgment filed by defendants A.H. Robins Co. and Hugh J. Davis, M.D., BE, and the same hereby IS, DENIED, without prejudice, in the following cases:

a. Madill, M 82-3789
b. Blair, HM 82-3791
c. Havice, M 83-162
d. Maxted, M. 83-1713

5. That the Clerk of Court shall place a copy of this Order and the foregoing Memorandum Opinion in each of cases cited in paragraphs 1 and 4 above; and

6. That the Clerk of Court shall mail copies of this Order and the foregoing Memorandum Opinion to counsel in these cases.

/s/ Frank A. Kaufman
Frank A. Kaufman
Chief Judge

/s/ Joseph H. Young
Joseph H. Young
Judge

/s/ Edward S. Northrop
Edward S. Northrop
Senior Judge

/s/ Herbert F. Murray
Herbert F. Murray
Judge

/s/ Alexander Harvey II
Alexander Harvey II
Judge

/s/ Joseph C. Howard, Jr.
Joseph C. Howard, Jr.
Judge

/s/ James R... Miller, Jr.
James R. Miller, Jr.
Judge

/s/ Waler E. Black, Jr.
Walter E. Black, Jr.
Judge

/s/ John R. Hargrove
John R. Hargrove
Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 19, 1995

No. 94-1820
CA-83-160-K

SUSAN SHADBURNE-VINTON
Plaintiff - Appellant

and

WILLIAM G. VINTON
Plaintiff

v.

DALKON SHIELD CLAIMANTS TRUST
Defendant - Appellee

OREGON TRIAL LAWYERS ASSOCIATION; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA; THE AMERICAN INSURANCE ASSOCIATION
Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing in Banc

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Appellees filed a petition for rehearing with suggestion for rehearing in banc.

Judge Widener voted to grant panel rehearing. Judges Russell and Chapman voted to deny.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Widener and Hall voted to rehear the case in banc, and Judges Ervin, Russell, Wilkins, Hamilton, Niemeyer, Luttig, Michael and Motz voted against rehearing in banc. Judges Murnaghan, Wilkinson and Williams recused themselves.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Chapman for the Court.

For the Court,

/s/ Bert M. Montague

CLERK

STATUTORY PROVISIONS

ORS 30.905:

Time limitation for commencement of action. (1) Notwithstanding ORS 12.115 or 12.140 and except as provided in subsection (2) of this section and ORS 30.907 and 30.908 (1) to (4), a product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption.

(2) Except as provided in ORS 30.907 and 30.908 (1) to (4), a product liability civil action shall be commenced not later than two years after the date on which the death injury or damage complained of occurs.

Or. Laws 1987 c.4 §§ 5-10:

SECTION 5. Notwithstanding ORS 30.905, a product liability civil action against the manufacturer of an intrauterine contraceptive device shall be commenced not later than two years after the date on which the plaintiff first discovered, or in the exercise of reasonable care should have discovered, the injury and the cause of the injury.

SECTION 6. Section 5 of this Act applies to all causes of action tried after the effective date of this Act.

SECTION 7. Section 5 of this Act is repealed on July 1, 1989. The repeal of section 5 of this Act by this section does not affect an action described in section 5 of this Act that is filed before July 1, 1989.

SECTION 8. A product liability civil action against the manufacturer of an intrauterine contraceptive device that has been dismissed may be refiled within one year of the effective date of this Act, regardless of when the cause of action accrued, if:

(1) the action was dismissed solely on the ground that it was barred by ORS 30.905 (1); and

(2) The action was dismissed on or after July 1, 1977.

SECTION 9. Notwithstanding ORS 30.905 (1), a product liability civil action against the manufacturer of an intrauterine contraceptive device that was first purchased for use eight years or more before the effective date of this Act may be commenced within one year of the effective date of this Act if the action has never before been commenced.

SECTION 10. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

Or. Laws 1989 c.642 §§ 2, 4:

Sec. 2. The statutes of repose in ORS 12.115, 30.905 (1) or any other statute of repose contained in Oregon Revised Statutes shall not apply to a product liability civil action against a manufacturer of an intrauterine device, resulting in IUD-related injuries.

Sec. 4. This Act applies to any product liability civil action against the manufacturer of an intrauterine device resulting from IUD-related injuries which is tried, arbitrated or settled after the effective date of this Act [July 6, 1989],

even if such an action has already been dismissed, so long as the dismissal is based on a previous version of the applicable statute of limitations or repose. This Act shall also apply to any product liability civil action against a manufacturer of an intrauterine device currently pending in the trial court or on appeal, in which the defendant manufacturer has raised the statute of limitations or repose as a defense. Any such action in which final judgment has been entered in favor of the manufacturer based solely on a previous version of the statute of limitations or repose may be refiled within one year of the effective date of this Act.

MOTION FILED

FEB 2 0 1996

No. 95-1154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DALKON SHIELD CLAIMANTS TRUST,
Petitioner,

v.

SUSAN SHADBURNE-VINTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF BAXTER HEALTHCARE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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February 20, 1996

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1154

DALKON SHIELD CLAIMANTS TRUST,
Petitioner,

v.

SUSAN SHADBURNE-VINTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, Baxter Healthcare Corporation ("Baxter") respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari submitted by the Dalkon Shield Claimants Trust. The respondent, Susan Shadburne-Vinton, has refused to consent to the filing of this brief.

Baxter, headquartered in Deerfield, Illinois, is a wholly-owned subsidiary of Baxter International Inc. It is one of the nation's largest manufacturers of healthcare products and devices, and sells, among many other products, heart valves, intravenous solutions, kidney dialysis machines and solutions, medical therapies derived from

human blood and from recombinant DNA, and a wide range of hospital supplies. Baxter's potential liability for many of the devices it (or other companies it has acquired) sold long ago has been extinguished, in many states, by statutes of repose. That potential liability, however, may be revived in various states where Baxter is amenable to suit if the judgment of the Fourth Circuit is allowed to stand. If that occurs, Baxter, like other manufacturers of medical products, will be forced, for an indefinite period of time, to divert attention and resources from developing new and innovative products to defending against legal claims it understood had long ago been extinguished.

Baxter also has a particular interest in this case because it is a successor-in-interest to a company which manufactured and sold breast implants in Oregon, among other places. It purchased that company's liabilities during a period when Oregon had in place a general statute of repose. In 1994, however, Oregon selectively exempted claims involving breast implants from that statute, Or. Rev. Stat. § 12.276 (1994), just as it selectively exempted claims involving IUDs several years earlier in the statute addressed in the petition, Pet. at 3, 5. Thus, despite the fact that it neither manufactured nor sold breast implants, Baxter may be forced to expend substantial resources in defending suits relating to those products unless the Fourth Circuit's judgment is overturned. For these reasons, Baxter wishes to present its views to assist the Court in understanding the extraordinary importance to all manufacturers of the legal principle that statutes of repose cannot retroactively be abolished without violating the Due Process Clause of the Fourteenth Amendment.

Accordingly, Baxter urges the Court to grant leave to file the *amicus curiae* brief that accompanies this motion.

Respectfully submitted,

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February 20, 1996

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QUESTION PRESENTED

Whether a state statute that revives liability which had been extinguished by a statute of repose violates the Due Process Clause.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

No. 95-1154

DALKON SHIELD CLAIMANTS TRUST,
Petitioner,
v.
SUSAN SHADBURNE-VINTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF BAXTER HEALTHCARE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

REASONS FOR GRANTING THE PETITION

Statutes of repose have been adopted in many states to provide manufacturers, both large and small, as well as various groups of professionals, with assurance that they can plan their affairs free from the threat of potential liability arising from products they made or services they rendered in the very distant past. Manufacturers and professionals reasonably rely on these statutes in structuring their affairs. This case provides this Court with an appropriate opportunity to reaffirm that these statutes actually

provide the certainty they purport to provide, and to reject a rule of law, such as that embodied in the Fourth Circuit's opinion, that states are free to destroy these protections retroactively and selectively by legislative fiat.

I. STATUTES OF REPOSE ARE A COMMON SOLUTION TO A SERIOUS PROBLEM, AND PROVIDE MANUFACTURERS AND PROFESSIONALS WITH MUCH-NEEDED CERTAINTY IN ORDERING THEIR DAY-TO-DAY ACTIVITIES.

As this Court is well aware, manufacturers of virtually all products are subject to lawsuits based on theories of strict liability, breach of warranty and negligence arising in connection with the manufacture and sale of products. The risk of such litigation is especially acute in the case of medical products, which often are used in patients who are sick or dying. In such patients, it may be very difficult to distinguish between injuries—if any—resulting from a product and the effects of the patient's underlying illness. And, because such patients often do not recover fully, there is at least a temptation to use litigation as a means of imposing the responsibility for any adverse outcome on the manufacturer of any medical product used during the treatment.

As this Court also is no doubt aware, the number of product liability suits soared during the 1960s and 1970s, and recoveries increased dramatically during that same period. *See, e.g.*, Note, *Limiting Liability: Products Liability and a Statute of Repose*, 32 Baylor L. Rev. 137, 139 (1980). As a result, insurers have been obliged to hike premiums, which manufacturers pass on to consumers in the form of higher prices. Some manufacturers, of course, unable to afford or even to obtain insurance, have been forced to remove products from the market.[1]

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[1] As the American Medical Association reported in 1988,

> Innovative new products [including vaccines, contraceptives, and other drugs and devices] are not being developed or are

To address the adverse social consequences of this explosion in products liability, many states, starting in the late 1970s, adopted statutes of repose. By the early 1980s, 48 states had adopted 98 such statutes. *See* Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 580 & n.3 (1981). Many of these statutes concern liability for products; others relate to medical malpractice and negligence by architects and contractors; and still others are general in scope. *Id.* at 580-81 n.3.

Statutes of repose address a number of serious problems. They relieve manufacturers and professionals of the obligation to defend against charges at a time when documents likely are no longer available and when memories have faded. They also relieve manufacturers of the burden of defending older design standards in the light of newer, better standards that were not achievable at an earlier time.

Most important, however, statutes of repose provide manufacturers absolute freedom from distant liability. As a consequence, manufacturers are supposed to be able to plan how to deploy their resources and, perhaps more critically, how properly to price their products, even in highly competitive markets, to reflect their risk of liability. In this way, such statutes also should allow companies to purchase and sell lines of business secure in the knowledge that the value they have assigned to the liabilities is relatively accurate.

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being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks.

AMA Board of Trustees, *Impact of Product Liability on the Development of New Medical Technologies* at 1 (June 1988).

Beyond these benefits, statutes of repose provide stability in the markets for products liability insurance. *See, e.g., Raithaus* v. *Saab-Scandia of Am., Inc.*, 784 P.2d 1158, 1161 (Utah 1989) ("[s]tatutes of repose . . . curb rising insurance rates [and] increase the availability of insurance"). Insurance rates are set on the basis not only of expected claims, but also on claims history. If dead claims can unexpectedly be revived, the whole process of statistically predicting future risks on the basis of past history is undermined, and insurers, at a minimum, are forced to charge a premium to protect against antique claims. *See generally* Note, 32 Baylor L. Rev. at 141.

This Court long ago recognized the importance of statutes of repose in holding that the immunity from liability that they confer is a constitutionally protected property right, which cannot retroactively be taken by a legislature. *William Danzer & Co.* v. *Gulf & Ship Island R.R.*, 268 U.S. 633 (1925). The Fourth Circuit, however, disagreed, and expressly refused to follow the plain holding of this Court. The implications of that decision, and a similar decision by the D.C. Circuit in *Wesley Theological Seminary of the United Methodist Church* v. *United States Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), are enormous. Under the terms of those decisions, the core benefit which statutes of repose provide nationwide —absolute predictability with respect to the value of old claims—is entirely undermined.

II. THE FOURTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

1. The Fourth Circuit's ruling, on its face, conflicts with this Court's decision in *Danzer* as well as the decision in *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945). In *Danzer*, this Court squarely held that the Due Process Clause prohibited Congress from reviving a time-limited claim created by the Interstate Commerce Act which, like the statute of repose in this case, "not

only barred the remedy but also destroyed the liability of defendant to plaintiff." *Danzer*, 268 U.S. at 636. According to this Court, "[o]n the expiration of the two-year period, it was as if liability had never existed." *Id.* Thus, revival of the dead claim "would . . . deprive defendant of its property without due process of law." *Id.* at 637.

This Court affirmed that holding some 20 years later in *Chase*. In that case, this Court held that an ordinary statute of limitations could retroactively be extended, reasoning that it had merely barred the plaintiff's remedy but had not extinguished its right (or, conversely, the defendant's liability). 325 U.S. at 314. In so doing, however, the Court expressly recognized that *Danzer* remained good law, stating that that case stood for the proposition that "where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law." *Id.* at 312 n.8. This Court also acknowledged the continuing vitality of *Danzer* as recently as 1976. *See International Union of Elec., Radio & Mach. Workers, AFL-CIO* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 243 (1976).

Notwithstanding the unmistakable clarity of these decisions, the Fourth Circuit elected not to follow them. According to that court, a more recent line of cases—including *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984), and *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992)—"commands . . . a different analysis." Pet. App. at 10a-11a. And, even more specifically, the court of appeals held that "[i]n light of this more recent Supreme Court precedent, we find that the analysis used by the Court in *Danzer* [and] *Chase* . . . is outdated and no longer valid for purposes of analyzing the constitutionality of retroactive legislation." *Id.* at 11a-12a.

In so doing, the Fourth Circuit plainly followed a course inconsistent with this Court's edict in *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989). There, the Fifth Circuit declined to follow *Wilko* v. *Swan*, 346 U.S. 427 (1953), because it believed, much like the court of appeals in this case, that "subsequent decisions ha[d] reduced *Wilko* to 'obsolescence.'" *Id.* at 479. This Court, in response, granted the petition and made clear that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions." *Id.* at 484. *See also Thurston Motor Lines* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam) ("Needless to say, only this Court may overrule one of its precedents").

More importantly, at this stage, the Fourth Circuit's decision, by virtue of its statement that a decision of this Court is "no longer valid," created an issue which manifestly is worthy of review by this Court. *See, e.g., Rodriguez*, 490 U.S. at 477; *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 103 (1944) (granting certiorari where court of appeals based its decision not on existing precedent but on "prophecy that this Court would change its course"); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943) (granting plenary review in case, *Barnette* v. *West Virginia State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D.W. Va. 1942), in which three-judge panel stated that "we do not feel that it is incumbent upon us to accept [one of this Court's decisions] as binding authority"); *see also Funk* v. *United States*, 290 U.S. 371 (1933) (granting certiorari to resolve tension between two lines of Supreme Court decisions); *cf. United States* v. *International Business Machines Corp.*, 116 S. Ct. 594 (1995) (granting certiorari in case, *International Business Machines Corp.* v. *United States*, 59 F.3d 1234 (Fed.

Cir. 1995), in which Federal Circuit declined to predict that this Court would overrule older precedent based on more recent developments in the law).

2. The decision of the Fourth Circuit also conflicts with a decision of the Eighth Circuit as well as decisions of a number of state courts, which have adhered to the doctrine set forth in *Danzer*. *See, e.g., In re Alodex Corp. Sec. Litig.*, 533 F.2d 372, 374 (8th Cir. 1976) (affirming district court opinion expressly adopting reasoning of *Danzer* on ground that it was "well reasoned"); *Smith* v. *Westinghouse Elec. Corp.*, 291 A.2d 452, 455 (Md. 1972) (relying on *Danzer* to nullify statute retroactively enlarging period for bringing wrongful death action); *Haase* v. *Sawicki*, 121 N.W.2d 876, 881 (Wis. 1963) (relying on *Danzer* to hold that retrospective extension of limitations period in statute of repose violates Due Process Clause).

These cases were correctly decided. There can be little question that statutes of repose create a strong property interest protected by due process. Indeed, the reliance interests created by such statutes are demonstrably more powerful than those involving claims to tenure in employment that this Court has long recognized as subject to the constraints of due process. *See, e.g., Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972); *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 571-72 (1972).

Thus, the only question is whether a state, such as Oregon, having formally conferred this special protection by legislation precisely to lull private parties to perform their primary conduct in a particular way, can simply change its mind in response to shifting political winds and dash all of the reasonable expectations of those private individuals and groups. To be sure, states have wide latitude to promote public policy, but there are limits to how far a state can go in changing the rules of the game

after the fact. *See Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 108 (1938); *cf. Lynch* v. *United States*, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States"). The statute here goes too far.

In short, the Court was correct in *Danzer* in concluding that a legislature's arbitrary choice to prefer one group of citizens over another in the face of a clear and formal commitment to provide repose exceeds its authority as constrained by the Due Process Clause. At a minimum, the *Danzer* opinion is sufficiently well reasoned that its fate should lie exclusively in the hands of this Court and not be left to the lower courts to choose to follow it or not as they prefer.

* * * *

The essential benefit of statutes of repose is that they provide certainty and allow manufacturers and professionals to structure their affairs without fear of remote liability. Although this Court seemingly disposed of the question whether such statutes confer constitutionally protected property rights upon their beneficiaries in *Danzer*, and while that decision has been widely followed, a number of courts, including the Fourth Circuit, have chosen consciously to disregard this Court's holding, speculating that this Court has changed its view. The Court should grant the petition to resolve that question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF FOR AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a statute that purports retroactively to repeal a statute of repose, for the express purpose of reviving causes of action that have already been extinguished by the prior statute of repose, violates the Due Process Clause under the controlling authority of *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925).

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BRIEF FOR AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

General Motors Corporation ("General Motors") is the world's largest manufacturer of automobiles.

On *four* occasions over the last eight years, the Oregon Legislature has passed special statutes that selectively exempt specific products from Oregon's 8-year statute of repose for product liability action (Or. Rev. Stat. 30.905 (1993)) and purport to revive causes of action that have already been extinguished by the running of the statute of repose. In the

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[1] Counsel for both petitioner and respondent have consented to General Motors Corporation's appearance as *amicus*. Letters evidencing such consent are on file in the Clerk's office.

latest instance, the Oregon Legislature has targeted *one product* made by *one manufacturer* -- General Motors.

From 1973 through 1987, General Motors manufactured pick-up trucks known, generically and collectively, as the C/K model pickup trucks ("C/K pickups"). The various C/K pickups all have their fuel tanks located on the sides of the truck outside the main frame rails but inside the side panels. The Department of Transportation has previously found, after a lengthy investigation, that there is no evidence that the C/K trucks do not meet all relevant federal safety standards regarding the ability of the vehicles' fuel tanks to withstand collision. National Highway Traffic Safety Administration ("NHTSA"), DOT Engineering Analysis EA 92-041 (Oct. 17, 1994), *vacated on other grounds*, 60 Fed. Reg. 13752 (Mar. 14, 1995). Indeed, publicly-available statistics regarding the real-world performance of the C/K trucks demonstrate that they protect their passengers very well in a serious collision. For example, such statistics show that in a side-impact collision there is a greater chance of dying in any of over 500 other vehicles on the road today than in a C/K pickup truck. "Evaluation of the Safety of GM 1973-87 C/K Pickup Trucks -- Exhibits" at Tab J1, General Motors' Submission to NHTSA, DOT EA 92-041 (Jan. 30, 1995.).

On August 19, 1994, Mrs. Anne Kirkwood was driving with her two grandchildren on U.S. Highway 97 in Oregon. Mrs. Helen Fort, who was driving a 1976 C/K pickup in the opposite direction on a two-lane road, lost control of her vehicle, crossed the centerline, and collided with Mrs. Kirkwood's vehicle. There was a post-collision fire. Mrs. Kirkwood and one of her grandchildren were seriously injured, and the other grandchild died.

The C/K truck that Mrs. Fort was driving was 18 years old at the time of the collision. Accordingly, any product liability action concerning the design of Mrs. Fort's C/K pickup truck was extinguished over ten years ago by Oregon's relevant statute of repose -- Or. Rev. Stat. 30.905(1) -- which

provides that "a product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption." Pet. App. 69a.

Not long after the tragic accident, a group called the "Justice for Anne Kirkwood Committee" sponsored Oregon Senate Bill 447 ("SB 447"). The specific purpose of the bill was to allow Mrs. Kirkwood to bring suit against General Motors notwithstanding the statute of repose. *See* Or. SB 447, 68th Legis. Assembly at Preamble (1995) (preamble stating that the bill was introduced "at the request of Justice for Anne Kirkwood Committee").[2] As passed, SB 447 exempts from the 8-year Oregon statute of repose for product liability actions any civil action "against a manufacturer of pickup trucks for death, injury or damage resulting from a fire caused by the rupture of a sidesaddle gas tank in a vehicle collision." SB 447 § 2(2).

Just like the Oregon statutory provision at issue in the petition for *certiorari*, SB 447 also purports explicitly to "revive any cause of action" that had previously been finally extinguished under the Oregon statute of repose. SB 447 § 3(2). General Motors thus has an immediate and direct interest in the outcome of this case, which challenges under the Due Process Clause the Oregon Legislature's ability to repeal Or. Rev. Stat. 30.905 retroactively -- *i.e.*, to revive a cause of action that has already been extinguished by that statute of repose.

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[2] *See, e.g.*, Debate of the Oregon House of Representatives on SB 447, 68th Oregon Legislative Assembly, Reg. Sess., Tape 67, Side B (Mar. 30, 1995) (remarks of Representative Prozanski) ("Yes, this is an individual bill for an individual group of people.").

SUMMARY OF REASONS FOR GRANTING THE WRIT

The petition raises important issues of constitutional law and judicial administration that are worthy of this Court's review. Indeed, the traditional factors considered by this Court in deciding whether to grant *certiorari* militate quite strongly in favor of granting the petition. Specifically:

1. There is a clear split among state and federal courts on the precise issue presented by the petition -- whether a legislature may, consistent with Due Process, retroactively revive causes of action that have already been extinguished by the existing statute of repose.

2. The petition also presents an important issue of judicial administration concerning this Court's central role in the hierarchy of the federal and state courts. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), this Court warned the federal Courts of Appeals that they should not arrogate to themselves the prerogative to overrule a precedent of this Court that is, by its terms, controlling. That is precisely what the Fourth Circuit did in this case, expressly concluding that this Court's decision in *William Danzer Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925), is "*outdated and no longer valid.*" Pet. App. 11a (emphasis supplied). The D.C. Circuit also effectively overruled *Danzer* in *Wesley Theological Seminary of the United Methodist Church v. United States Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). Granting the petition is important to reiterate to the Courts of Appeals that this Court meant what it said in *Rodriquez de Quijas*.

3. The Court of Appeals' effective overruling of *Danzer* is particularly wrong because that case can easily be reconciled with this Court's more recent decisions rejecting Due Process challenges to retroactive civil legislation -- such as *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and *Pension Benefits Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717

(1984). From the standpoint of judicial administration, at the very least, the Court of Appeals was obliged to *try* to reconcile *Danzer* with *Turner Elkhorn* and *Pension Benefits* before casting it overboard.

The principle that reconciles *Danzer* with these later cases is the fundamental proposition that the Due Process Clause prevents a legislature from simply abolishing property rights that had already accrued under preexisting law. Under this Court's decisions determining what interests rise to the level of a protected property right, it is clear that the defendants in *Turner Elkhorn* and *Pension Benefits* did not have a "property" right in the prior state of the law before the new legislation was enacted. By contrast, the defendant in *Danzer* had a protected property interest in the form of an outright immunity from suit. Similarly, in this case, the Oregon legislature granted defendants an important immunity which, once accrued, rises to the level of a protected property right.

4. The petition presents a recurring issue, which could potentially arise in hundreds of different contexts across the Nation. Oregon has already retroactively extinguished existing rights of repose in four separate contexts. Similar measures have been proposed and enacted in a number of other states in recent years. Unless this Court makes clear that the decision below is incorrect, dozens of other states that have statutes of repose may well be emboldened to try the same thing. Moreover, until decisions such as the one below are reviewed by this Court, *no* defendant *anywhere* can enjoy true "repose" because of the threat that the legislature may decide to abrogate such repose at a later time, without regard for any property rights that have already accrued under preexisting law. That uncertainty has significantly pernicious consequences for many sectors of the Nation's economy.

5. Finally, we respectfully suggest that there is room on this Court's current docket for a case such as this one that presents important issues of constitutional law and judicial

administration. By comparison to other recent years, this Court's current docket is not nearly full.

REASONS FOR GRANTING THE WRIT

As the petition makes clear, this case involves the question of the continued validity of this Court's decision in *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925), as further construed in *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304 (1945), *reh'g denied*, 325 U.S. 896 (1945) and *International Union of Elec., Radio and Mach. Workers AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

In *Danzer*, this Court addressed the constitutionality of a retroactive enlargement of a statutory period for bringing suit. The Court adopted a line of analysis that has become fundamental for courts and legislatures in this area of the law. That analysis distinguishes between a statute of limitations, which erects a mere procedural bar to a plaintiff bringing suit after a specified period, and a statute of repose, which extinguishes any existing liability and thus confers an outright immunity from suit upon potential defendants after the specified period has elapsed.

This Court first drew this distinction in *Danzer*. Some limitations statutes, the Court explained, "relate[] to the remedy only" and do not invest a defendant with any right to be free from suit. *Danzer*, 268 U.S. at 637. Repeal or alteration of such "statutes of limitations" cannot deprive a defendant of any property right in violation of the Due Process Clause. *Id.* at 636-37. But another class of statutes "operate[s] as a limitation on liability" and a defendant accrues a right of repose once the limitation period has run. *Id.* at 637. Retroactively amending such a statute of repose to revive a liability that had already been extinguished under prior law "would . . . deprive [the] defendant of its property without due process of law." *Id.*

Because the statute at issue in *Danzer* belonged to this latter class of statutes, this Court held it unconstitutional.

Twenty years later, in *Chase* this Court reaffirmed the distinction announced in *Danzer*. *Chase* upheld a law retroactively amending a statute of limitations to revive a previously barred claim. This Court observed that such legislation "d[id] not parallel . . . the *Danzer* case" because it "merely . . . reinstate[d] a lapsed remedy" and did not infringe a defendant's "right to immunity." *Chase*, 325 U.S. at 312 n.8.

This Court has never overruled *Danzer* or *Chase*. On the contrary, as recently as 1976, this Court relied upon the distinction embodied in *Danzer* and *Chase* to reject a challenge to a retroactive enlargement of a statute of limitations. *International Union of Elec., Radio and Mach. Workers*, 429 U.S. at 243-44. Nevertheless, both the Fourth Circuit Court of Appeals in this case, as well as the D.C. Circuit Court of Appeals in *Wesley Theological Seminary of the United Methodist Church v. United States Gypsum Co.*, 876 F.2d 119 (1989), *cert. denied*, 494 U.S. 1003 (1990), have explicitly held that they are free to ignore *Danzer* as "outdated," Pet. App. 11a, and/or as "completely defunct," *Wesley*, 876 F.2d at 122.

I. THE PETITION SHOULD BE GRANTED TO RESOLVE A SPLIT AMONG THE FEDERAL COURTS OF APPEALS AND THE STATE SUPREME COURTS.

There is a clear split among the federal courts of appeals regarding whether *Danzer* remains good law and prevents a legislature from abrogating a defendant's accrued substantive right of repose. Indeed, the courts are all over the map on the issue:

While the Fourth Circuit and the D.C. Circuit have concluded that *Danzer* is outmoded and that a legislature is free to abrogate an accrued right of repose (so long as its decision to do so is not irrational), other federal courts have continued

to follow and faithfully apply *Danzer*, holding that Due Process prohibits a legislature from abrogating an accrued right of repose. *In re Alodex Corp. Secs. Litig.*, 533 F.2d 372, 374 (8th Cir. 1976) (per curiam) (affirming "on the basis of the well-reasoned District Court opinion"), *aff'g*, 392 F. Supp. 672, 680-81 (S.D. Iowa 1975) (under *Danzer* and *Chase*, retroactively enlarging applicable period under preexisting statute of repose to revive previously extinguished claim violates the Due Process Clause).

In addition, a number of state courts of last resort have remained faithful to this Court's decision in *Danzer* by holding that the Due Process Clause prevents a legislature from abrogating rights of repose that had already accrued under prior law. *Smith v. Westinghouse Elec. Corp.*, 291 A.2d 452, 455 (Md. 1972) (relying on *Danzer* to invalidate retroactive enlargement of period for bringing suit under wrongful death statute); *Haase v. Sawicki*, 121 N.W.2d 876, 881 (Wis. 1963) ("retrospective extension of the limitation period [in a statute of repose] after its expiration amount[s] to a taking of property without due process of law"); *Colony Hill Condominium I Ass'n v. Colony Co.*, 320 S.E.2d 273, 276 (N.C. Ct. App. 1984) (to "revive a liability already extinguished [by repose] . . . would . . . deprive [defendants] of due process"), *review denied*, 325 S.E.2d 485 (N.C. 1985).

Still other courts -- both state and federal -- have continued to rely on the distinction set forth in *Danzer* and *Chase* to *reject* challenges to the retroactive amendment of statutes of *limitations* (as opposed to statutes of *repose*). For example: *Starks v. S.E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982) (because "statutes of limitation go to matters of remedy only," retroactive amendment of such statute is constitutional, distinguishing *Danzer*); *Davis v. Valley Distrib. Co.*, 522 F.2d 827, 830 n.7 (9th Cir. 1975) (*Chase* distinguished *Danzer* on the ground that in *Danzer* "Congress had intended the expiration of the limitation period to put an end to the existence of the liability itself, not to the remedy

alone"), *cert. denied*, 429 U.S. 1090 (1977); *Chevron Chem. Co. v. Superior Court*, 641 P.2d 1275, 1282 (Az. 1982) ("right to raise a one year statute of limitations defense . . . is [not] a vested property right," distinguishing *Danzer*); *Vigil v. Tafoya*, 600 P.2d 721, 725 (Wyo. 1979) (retroactive application of statute of limitations does not contravene Due Process where the "duty [has] not cease[d] to exist even though judicial enforcement is barred by an artificial statute of limitation"); *Roe v Doe*, 581 P.2d 310, 316 (Haw. 1978) (retroactive amendment to statute of limitations is constitutional where "there is no reason to believe that the legislature intended to confer, through the statute of limitations . . . 'a vested right or proprietary interest in immunity from liability'") (quoting *Davis*, 522 F.2d at 830 n.7); *Ohlsen v. J.S.*, 268 N.W.2d 781, 786 (N.D. 1978) ("reviving causes of action previously barred [by a statute of limitations] does not violate the due process clause [because] . . . [defendants] have no vested right in not being made a party" to the suit); *Twomey v. Carlton House of Providence, Inc.*, 320 A.2d 98, 101 n.5 (R.I. 1974) (retroactively restoring a cause of action barred by a statute of limitations is constitutional, but distinguishing statutes, which "as in . . . *Danzer* . . . extinguish the right rather than just the remedy"). These decisions properly recognize the continued vitality of this Court's analysis in *Danzer* and *Chase*.

Finally, several state supreme courts have looked to the distinction drawn by this Court in *Danzer* and *Chase* for guidance in determining what due process requires under their state constitutions. *City of Boston v. Keene Corp.*, 547 N.E.2d 328, 335 (Mass. 1989) (because "the running of the applicable limitations period bars only the legal remedy, while leaving the underlying cause of action unaffected," it "does not create a vested right which cannot constitutionally be taken away"); *School Bd. of Norfolk v. United States Gypsum Co.*, 360 S.E.2d 325, 328 (Va. 1987) (right of repose could not be abrogated by retroactive application of revival statute; *Chase* distinguished on the grounds that it did not involve a statute of repose that "grant[ed] a defendant [a right of] immunity from liability");

Lester v. State Workmen's Compensation Cmm'r, 242 S.E.2d 443, 452 n.15 (W.Va. 1978) (*Danzer* prohibits a state legislature from "extend[ing] a period of limitation after it has expired where the limitation period is considered a part of the substantive right"). These decisions deepen the fault line between the courts that continue to follow *Danzer*, and thus faithfully apply this Court's holding in that decision, and the courts that have taken it upon themselves to overrule *Danzer* and treat it as no longer being good law.

It is thus clear that there is *substantial* confusion in the state and federal courts on this issue. With the federal courts of appeals split on the issue (the Fourth and D.C. Circuits effectively overruling *Danzer* and the Eighth and Ninth Circuits faithfully applying it), there is no reason to believe that the confusion will dissipate. Accordingly, this Court's review is needed.

II. THE PETITION SHOULD BE GRANTED TO MAKE CLEAR TO THE FEDERAL COURTS OF APPEAL THAT THEY SHOULD NOT ACT ON THEIR OWN TO OVERRULE DECISIONS OF THIS COURT.

The petition also raises an important issue of judicial administration.

In *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), this Court admonished the lower federal courts that the prerogative of overruling a decision of this Court belonged exclusively to this Court. In *Rodriquez de Quijas*, the issue was whether a predispute agreement to arbitrate claims under the Securities Act of 1933 was enforceable. The District Court held that the agreement was not enforceable, relying on this Court's 1953 decision in *Wilko v. Swan*, 346 U.S. 427 (1953), which held that Securities Act claims must proceed in court. The Court of Appeals reversed, concluding that "the arbitration agreement is enforceable because th[e Supreme] Court's subsequent

decisions have reduced *Wilko* to 'obsolescence.'" 490 U.S. at 479 (citation omitted).

Although this Court decided to overrule *Wilko*, it nevertheless admonished the Court of Appeals (there, the Fifth Circuit) for not following it. Speaking for the Court, Justice Kennedy wrote that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 484. This is so even where, as was true in *Rodriquez de Quijas*, it is clear as a bell that the prior Supreme Court decision is flatly inconsistent with its subsequent decisions. *See id.* at 480, 481 (observing that *Wilko* was "far out of step with" the Court's subsequent decisions and had been "steadily eroded over the years"). In short, it is simply *not* for the Courts of Appeals to determine that a controlling Supreme Court decision should not be followed because, in their view, subsequent decisions may have undermined it or "reduced [it] to 'obsolescence.'" *Id.* at 479 (citation omitted).

In this case, the Fourth Circuit Court of Appeals flouted Justice Kennedy's admonition in *Rodriquez de Quijas* in the clearest fashion. Nowhere in the decision below does the Court dispute that, if followed, *Danzer* would invalidate the Oregon law at issue in this case.[3] Instead, the Court of Appeals decided that it was free simply to ignore *Danzer*, holding that "[i]n light of this more recent Supreme Court precedent [*e.g.*, *Turner Elkhorn* and *Pension Benefits*], we find that the analysis used by the Court in *Danzer*, *Chase*, and *Campbell v. Holt*, 115

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[3] The statute at issue, Or. Rev. Stat. 30.905(1), is a statute of repose that extinguishes the cause of action at the end of the statutory period. *See Pottratz v. Davis*, 588 F. Supp. 949, 952 (D. Md. 1984) (interpreting Or. Rev. Stat. 30.905); *DeLay v. Marathon LeTourneau Sales & Serv. Co.*, 630 P.2d 836 (Or. 1981). Thus, under *Danzer*, a statute purporting to revive the extinguished claim by retroactively repealing Or. Rev. Stat. 30.905(1) violates the Due Process Clause.

U.S. 620 (1885) is *outdated and no longer valid* for purposes of analyzing the constitutionality of retroactive legislation." Pet. App. 11a-12a (emphasis supplied). It is difficult to imagine a more direct disregard for the rule of *Rodriquez de Quijas*.

And the Fourth Circuit is not the only Court of Appeals to ignore *Danzer*. In *Wesley*, the D.C. Circuit also refused to apply *Danzer* to invalidate a law reviving a claim barred by the District of Columbia's statute of repose. The D.C. Circuit held that the distinction drawn by this Court in *Danzer* and *Chase* between statutes of repose and statutes of limitations "is either *completely defunct* or, at the very most, establishes procedural rules as a safe harbor within which a legislature may freely make retroactive changes." *Wesley*, 876 F.2d at 122 (emphasis supplied).[4] The D.C. Circuit made this statement despite the widespread recognition by courts and legislatures of the important practical and conceptual differences between statutes of limitations and statutes of repose.

It is evident that, unless this Court steps in and reaffirms the rule of *Rodriquez de Quijas*, the lower federal courts will continue to feel free to ignore *Danzer* and other controlling decisions of this Court whenever they determine

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[4] Both the court below and the D.C. Circuit in *Wesley* appeared to denigrate *Danzer* as a "*Lochner*-era" precedent. Yet this characterization ignores the Court's respectful discussion of the *Danzer* holding in such later cases as *Chase* and *Robbins & Myers*. It also glosses over the key infirmity in the *Lochner* line of cases, which essentially disabled legislatures from acting in broad realms of economic and social policy, as distinct from the more procedural point pressed here, which is that the legislature is free to modify or repeal statutes of repose *prospectively*, but can do so retroactively only insofar as it does not purport to extinguish substantive immunities that had already accrued under the preexisting law. If an accrued cause of action is "a species of property protected by the Fourteenth Amendment's Due Process Clause," *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988), as this Court has repeatedly held, then an accrued immunity from suit must be given similar treatment for purposes of the constitutional analysis.

that their reasoning may be "outdated," Pet. App. 11a, "defunct," *Wesley*, 876 F.2d at 122, or "obsele[te]," *Rodriquez de Quijas v. Shearson/Lehman Bros., Inc.*, 845 F.2d 1296, 1299 (5th Cir. 1988), *aff'd*, 490 U.S. 477 (1989). This Court should grant the petition if for no other reason than to make clear that it meant what it said in *Rodriquez de Quijas*.

III. *DANZER* IS EASILY RECONCILABLE, AND ENTIRELY CONSISTENT, WITH THIS COURT'S SUBSEQUENT DECISIONS UPHOLDING CERTAIN RETROACTIVE CIVIL LEGISLATION.

Rodriquez de Quijas establishes that a Court of Appeals may not overrule or ignore a controlling decision of this Court even when that decision *cannot* be reconciled with later decisions. But here, the Court of Appeals' error is much worse because, far from being "outdated and no longer valid," Pet. App. 11a, *Danzer* is easily reconcilable with this Court's more recent decisions in cases such as *Turner Elkhorn* and *Pension Benefits*.

The reconciling principle is this: the Due Process Clause prohibits a legislature from simply abolishing "property" rights that have already accrued -- *i.e.*, from "depriv[ing] any person of property without due process of law." U.S. Const. amend. XIV. In cases such as *Turner Elkhorn* and *Pension Benefits*, the defendants had no legitimate expectation that rose to the level of a protected "property" right that the retroactive application of the new legislation abrogated. Similarly, in *Chase*, it was reasonable for the Court to conclude that the defendant had no "property" right arising out of a mere procedural limitation on the plaintiff's remedy. By contrast, however, the holding of *Danzer* is that a defendant *does* acquire a protected "property" right once a statutory provision has specifically extinguished a potential cause of action, and thus granted to the defendant an outright immunity from suit.

More specifically: Time and time again, this Court has held that the sort of state-law interests that rise to the level of protected property interests under the Due Process Clause are not limited to interests in real or tangible personal property. Rather, this Court has said that the words "liberty" and "property" in the Due Process Clause "are broad and majestic terms" and "relate to the whole domain of social and economic fact." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). The interests that rise to the level of property for purposes of the Due Process Clause are "not limited by a few rigid, technical forms," but rather include "a broad range of interests that are secured by 'existing rules or understandings.'" *Perry v. Sinderman*, 408 U.S. 593, 601 (1972) (citation omitted).

Thus, for example, this Court has held that property interests protected by the Due Process Clause include not only real and tangible personal property, but also such other interests created by state or federal law such as licenses, *Barry v. Barchi*, 443 U.S. 55 (1979) and *Bell v. Burson*, 402 U.S. 535 (1971); causes of action, *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); government employment, *Perry*, 408 U.S. 593; welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970); disability benefits, *Mathews v. Elridge*, 424 U.S. 319 (1976); and utility service, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).

In these cases, and others, the Court has articulated a simple and straightforward standard for determining when state law grants a party a protected property interest. The Court has held that if, under state law, the party claiming due process protection merely has "an abstract need or desire for [the benefit]" or a "unilateral expectation of it," then he does not have a property interest that is protected by the Due Process Clause. *Roth*, 408 U.S. at 577. If, however, the party claiming the benefit has "a legitimate claim of entitlement to it" under the law that gives rise to the interest (*e.g.*, state law), then he

has a property interest that may not be abrogated by the legislature. *Id.*[5]

These principles should have been the basis for the Court of Appeals reconciling *Danzer*, *Chase*, *Turner Elkhorn*, and *Pension Benefits*. Thus:

(i) Both *Turner Elkhorn* and *Pension Benefits* involved the retroactive application of new civil legislation where no previous relevant legislation existed. The critical point in those cases is that defendants therein had not been granted any substantive immunity -- any "legitimate claim of entitlement" to immunity -- by the legislature that was abrogated by the new legislation. Rather, the defendants in those cases had, in the words of this Court's due process cases, merely "an abstract need or desire" that they would continue not to be the subject of any regulation. But a mere expectation in the current state of the law is not a protected property interest.

(ii) Similarly, the defendant in *Chase* also did not have any protected property interest. *Chase* involved the retroactive extension of a statute of limitations. It was entirely reasonable for the Court to conclude that a defendant's interest in a true statute of limitations -- which merely limits the plaintiff's remedy but does not grant immunity to the defendant -- does not rise to the level of a protected property interest. A defendant's interest in a statute of limitations can be thought of as that of a mere third-party beneficiary. The defendant is not a direct recipient of any substantive grant of immunity, but rather is merely a third-party beneficiary of the procedural bar that has been erected on the plaintiff's remedy. Thus, it was entirely reasonable for the Court to conclude in *Chase* that

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[5] It makes no difference either that the initial grant of the benefit was entirely a matter of legislative grace, or that the legislature could decide that it will not, prospectively, continue to grant the benefit. What matters is that the legislature took affirmative action that grants a defendant a "legitimate claim of entitlement" that rises to the level of a protected property right. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).

there was no due process violation because there was no deprivation of a protected property right.

(iii) By contrast, the holding of *Danzer* is that the defendant *does* have a protected property interest in a statutory provision, such as a statute of repose, that directly limits the *defendant's* liability as opposed to merely limiting the plaintiff's remedy. A statute such as that in *Danzer*, or a more modern statute of repose, grants an important benefit directly to the defendant that accrues after a specified number of years has elapsed. Once the conditions of the benefit are satisfied (*i.e.*, the requisite number of years passes), the defendant has, in the words of this Court's due process cases, "a legitimate claim of entitlement" to immunity from suit. Once granted under the law, and once accrued through the passage of time, that benefit rises to the level of a protected property interest. This is exactly what this Court held in *Danzer*, concluding that to give retroactive effect to the statute "would [have] be[en] to deprive [the] defendant of its *property* without due process of law." *Danzer*, 268 U.S. at 637 (emphasis supplied).

In short, far from being "no longer valid," *Danzer* is easily reconcilable with *Chase*, *Turner Elkhorn*, and *Pension Benefits* because a defendant has a property right in an accrued right of repose, whereas a defendant has no such property right under either a statute of limitations (*Chase*) or in the mere continuance of the current state of the common law or regulatory law (*Turner Elkhorn* and *Pension Benefits*). This Court should grant the petition in order to explicitly reconcile these two lines of cases, which the Courts of Appeals have proven unable, and/or unwilling, to do.

IV. THE DECISION BELOW RAISES A RECURRING ISSUE THAT COULD AFFECT MANY SECTORS OF THE NATIONAL ECONOMY.

The issue presented by this petition has arisen time and time again, as the shifting political winds have tempted

legislatures periodically to attempt to strip away retroactively the rights of repose that had been conferred upon particular defendants and that had already accrued under the law. The resulting uncertainty about the nature of the right (and reliance upon it) threatens to undermine completely the substantial economic benefit that repose statutes otherwise provide.

Most of the modern statutes of repose, like Or. Rev. Stat. 30.905, were enacted in response to the insurance "crisis" of the late 1960's and 1970's. Michael John Byrne, *Let Truth Be Their Devise: Hargett v. Holland And The Professional Malpractice Statute of Repose*, 73 N.C. L. Rev. 2209, 2220 (1995). This crisis was precipitated by courts around the country abolishing or restricting traditional tort defenses, and thereby exposing defendants to potentially vast liability of theoretically infinite duration. As a result, the number and scope of lawsuits increased dramatically, and insurers were either driven out of the market or forced to raise their rates significantly. *See generally*, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627 (1985).

In order to ameliorate the harmful impact of these trends, legislatures around the country enacted "statutes of ultimate repose" that were designed to "fix a limited and predictable time period in which a [potential defendant] would be exposed to a . . . civil action." *Erickson Air-Crane Co. v. United Technologies Corp.*, 735 P.2d 614, 616 (Or. 1987), *modified on other grounds*, 736 P.2d 1023 (Or. 1987). Thus, for example, by 1991, at least forty-six states had enacted repose statutes to protect architects and engineers from otherwise potentially never-ending liability. *See generally Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 827-28 (Mo. 1991). Similarly, by 1995, more than twenty states had enacted product liability statutes of repose. *See generally* Christopher C. McNatt, Jr., *The Push for Statutes of Repose in General Aviation*, 23 Transp. L.J. 323 (Fall 1995). Other common repose statutes offer eventual immunity from

malpractice claims, *see, e.g.*, N.C. Gen. Stat. § 1-15(c) (1983), or from disputes over improvements to real property. *See, e.g.*, N.C. Gen. Stat. § 1-50(5)(a)-(6) (1985). Indeed, many states, like Oregon, have multiple statutes of repose, and thus provide these substantive grants of immunity to many different industries. *See, e.g.*, Or. Rev. Stat. 30.905 (repose for product liability) and Or. Rev. Stat. 12.135(1) (1993) (repose for contractors). Indeed, there are hundreds of repose statutes in effect today that have enormous collective impact on substantial segments of the national economy.

Recently, the federal government has also recognized the important role played by statutes of repose in protecting industry and jobs against potential ruinous and never-ending litigation. Just last year, Congress passed the General Aviation Revitalization Act ("GARA"), 49 U.S.C. § 40101 (1995), which features a federal statute of repose covering general aviation aircraft. GARA "was passed primarily to salvage the American general aviation industry which had been decimated by spiraling litigation costs." McNatt, *supra*, at 324.

This prevalence of statutes of repose -- at both the state and, now, the federal level -- is *itself* sufficient to establish that the issue raised by the petition has the *potential* of arising in a very significant number of cases. But we need not rely merely on the *potential* for the issue to recur, for the issue has already *actually* arisen in many different contexts. For example, Oregon alone has attempted to retroactively abrogate a statute of repose on *four* separate occasions over the last eight years. And many other States have tried to do the same thing in recent years. *See generally Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 774-75 (Neb. 1991) (collecting cases).

The effect of such attempts to abrogate accrued rights of repose threatens to vitiate the entire benefit of such statutes. Because of the very nature of "repose," any uncertainty in the state and federal courts effectively destroys much of the benefit that repose is intended to provide, particularly on the setting of insurance rates. For if even *some* courts have held that the

right of repose, even after it has accrued under preexisting law, can be abrogated at will by the legislature, then *no* person *anywhere* can enjoy true repose.

This Court should grant the petition in order to clarify whether the Due Process Clause mandates that a right of repose, once the legal immunity has been granted and has accrued, cannot be abolished retroactively.

V. THERE IS PLENTY OF ROOM ON THIS COURT'S CURRENT DOCKET FOR A CASE SUCH AS THIS ONE THAT RAISES IMPORTANT ISSUES OF CONSTITUTIONAL LAW AND JUDICIAL ADMINISTRATION.

There appears to be plenty of room on this Court's current docket for a case such as this one that raises important issues of constitutional law and judicial administration, and on which there is a split of authority in the state and federal courts.

This Term, the Court will hear argument in only 83 cases. *See* Appendix. That is fewer than half the number of cases that were argued as recently as OT 1988. Moreover, as of today, the Court has granted only 53 petitions this Term, a pace that appears to be well under half that of a decade ago. *Id.* As a result, it is most unlikely that the Court will come close to filling the traditional number of sitting days during OT 1996.

We are not here arguing that the Court's relatively lighter work load justifies granting a petition that does not otherwise warrant the Court's review. Rather, our point is that the clear absence of a crushing workload for the next Term eliminates any need to pass over a petition, such as the present one, that raises important and recurring issues of constitutional law, in order to preserve the Court's necessarily limited resources.

CONCLUSION

For all the reasons stated herein and in the petition for *certiorari*, the petition should be granted.

Respectfully submitted,

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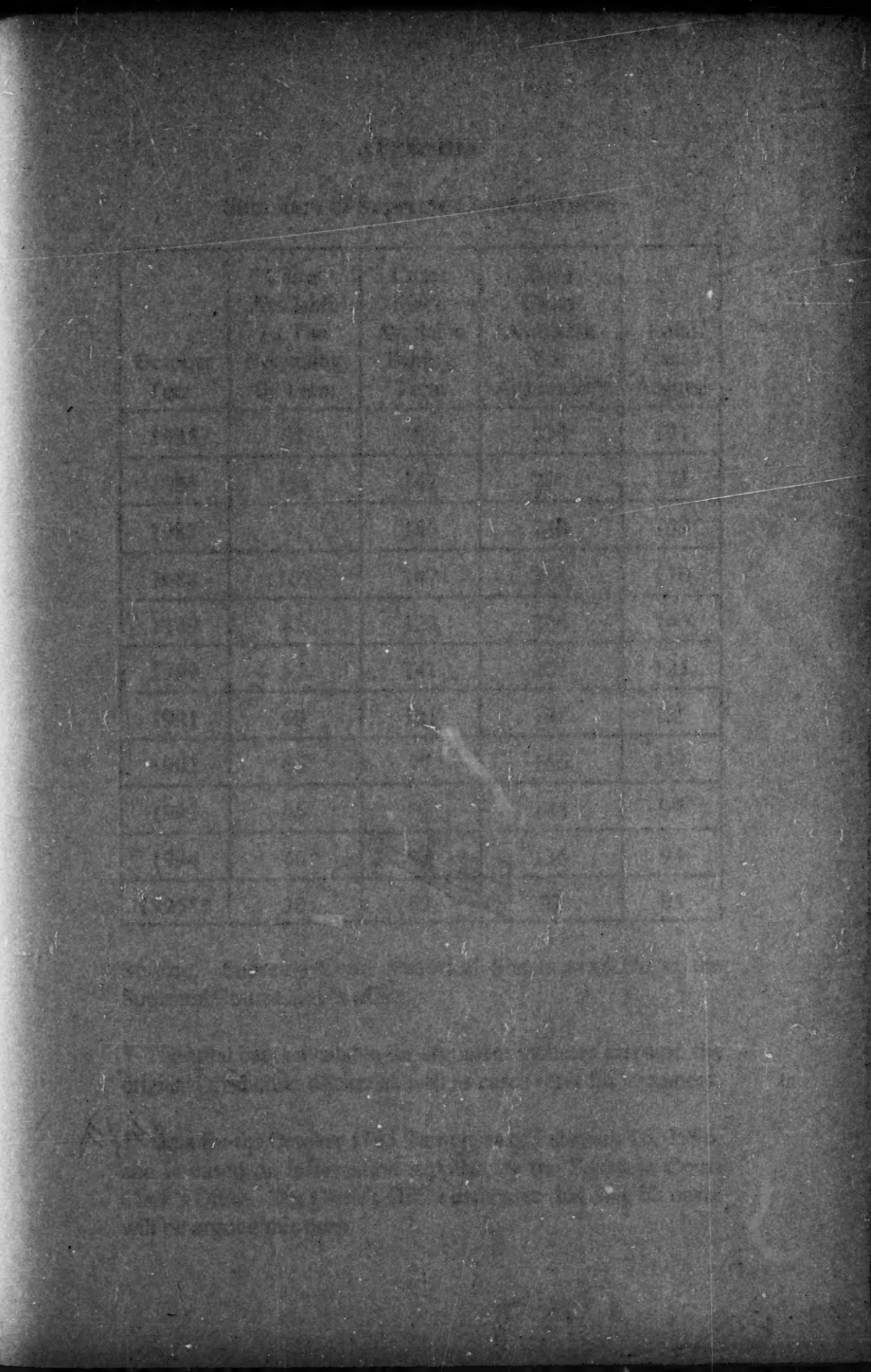

APPENDIX

Summary of Supreme Court Statistics

October Term	Cases Available At The Beginning Of Term	Cases Made Available During Term	Total Cases Available For Argument*	Total Cases Argued
1985	87	187	276	171
1986	101	167	270	175
1987	91	180	280	167
1988	105	147	254	170
1989	81	122	204	146
1990	57	141	201	125
1991	69	121	196	127
1992	66	97	166	116
1993	46	99	145	99
1994	40	93	136	94
1995**	38	53	92	83

Source: Supreme Court Statistical Sheets available at the Supreme Court Clerk's office.

* The total cases available for argument includes cases on the original jurisdiction docket as well as cases reset for argument.

** Data for the October 1995 Term is as of February 16, 1996, and is based on information supplied by the Supreme Court Clerk's Office. The Clerk's Office estimates that only 83 cases will be argued this term.

(4)

Supreme Court, U.S.
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No. 95-1154

In The

Supreme Court of the United States

October Term, 1995

DALKON SHIELD CLAIMANTS TRUST,

Petitioner,

v.

SUSAN SHADBURNE-VINTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court reverse seventy years of constitutional development upholding the rights of a legislature to withdraw a statutory immunity granted to a class of defendants, where a rational legislative purpose supported that action?

2. Should the Court now extend the narrow scope of an obscure 1925 decision (*William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633) applicable only to statutory causes of action, in order to limit a legislature's right to abolish special-interest statutory immunities?

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STATUTE

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BRIEF IN OPPOSITION

Respondent Susan Shadburne urges that the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit be denied for the reasons set forth below.

STATEMENT OF THE CASE

The petition of the Dalkon Shield Claimants Trust seeks review of a decision of the appellate court reversing judgment on the pleadings, entered by a judge of the United States District Court for the District of Maryland. The Maryland federal court had declared unconstitutional a remedial statute enacted by the Oregon Legislative Assembly, limiting the scope of that state's statute of ultimate repose applicable to certain classes of product liability actions. Ore. Rev. Stat. 30.905.

Shadburne is one of approximately 200,000 women who asserted claims for serious personal injuries and consequential damages from use of the Dalkon Shield intrauterine contraceptive device (IUD), manufactured and marketed by A. H. Robins Company (Robins) from 1971 to 1974, when it was withdrawn from the market. As did many of those women, she brought suit against Robins, which ultimately invoked chapter 11 bankruptcy in August 1985. By that time, however, her action and those of a number of other Oregon residents had been dismissed on the basis of their state's statute of repose. That statute denied a remedy after lapse of time from purchase of the product, even where the plaintiff was

blamelessly unaware of the cause of her subsequent injuries. The dismissal of a number of the Oregon Dalkon Shield claims was appealed to the Fourth Circuit Court of Appeals, and the appeal was pending when the bankruptcy petition was filed in 1985.

Recognizing that a victim compensation fund was to be created as a result of that bankruptcy, the Oregon legislature took steps during its pendency to abolish the statute of repose applicable to IUD claims[1], just as it had earlier done with respect to asbestos claims, and subsequently would do with respect to silicone breast implant claims.

When petitioner Dalkon Shield Claimants Trust (the Trust) was created as a result of the Robins plan of reorganization, Shadburne was permitted to file her claim, which was acknowledged by the Trust and an inadequate settlement offer made. Following Trust procedures, she rejected that offer and was "certified" by the bankruptcy court to pursue litigation against the Trust. In the course of that litigation, however, the Trust sought

---

[1] Petitioner cynically asserts (p. 3) that the Oregon legislature was "responding to the political pressure exerted by the personal injury plaintiffs' bar to enact revival statutes directed at the manufacturers of whatever product is the most recent topic of litigation publicity." However, only one dissenting vote against this amendment was recorded in both houses of the Oregon legislature, who recognized that without the amendment, the women of Oregon would be the only victims of the notorious Dalkon Shield not able to be compensated from a $2.3 billion fund established by the manufacturer and approved by the bankruptcy court in Richmond.

judgment on the pleadings to declare the amended Oregon statute unconstitutional as violating its due process rights.

More than ten years after her action was first brought – in Maryland, where the Dalkon Shield was invented and developed – a district judge dismissed her action as untimely filed, relying on the Oregon repose statute and declaring its amendment unconstitutional under the 70-year-old *William Danzer* decision of this Court.

SUMMARY OF ARGUMENT

The Court should deny the petition for writ of certiorari since further review is undesirable, as the issue presented in the district court was narrow and non-precedential.

Moreover, this Court in a consistent line of decisions since at least 1976 has adopted and enunciated the "rational legislative purpose" test applicable to retroactive legislation, which test was followed on carefully articulated grounds by the court of appeals.

Finally, contrary to petitioner's assertion, the few decisions of other circuits dealing with retroactive abolition of a statute of repose have unanimously held such legislative acts to be constitutional.

ARGUMENT

The Court should deny the petition since the decision below is consistent with unbroken constitutional authority of more than twenty years.

The Court should deny the petition since the decision of the court of appeals is without significant precedential value, as consistent with "landmark" rulings of the Court in 1976 (*Usery v. Turner Elkhorn Mining Co.*, 428 U. S. 1) and 1984 (*Pension Benefit Guaranty Corp. v. Gray*, 467 U. S. 717). Moreover there is no split of authorities at the circuit court level, and the narrow and unusual facts here do not warrant reversal of that line of authorities in this case.

Petitioner would have the Court review and overturn a cogently reasoned and clearly articulated opinion of Senior Judge Chapman, reinstating plaintiff's undoubted right to compensation for her injuries caused by the Dalkon Shield intrauterine device. The only basis asserted for disallowance of her claim was the Oregon statute of repose for product liability claims, which has since been amended to exclude injuries caused by IUDs and other clearly dangerous products.

By its petition, the Dalkon Shield Claimants Trust would have the Court reject and reverse twenty years of consistent constitutional decisions by this Court and lower federal courts upholding the retroactive application of a legislature's power to modify its own statutory immunities, as against due process claims. Petitioner urges the Court to ignore those decisions and to vest potential defendants with a new constitutional right or "immunity" to be free from litigation – even where a

rational legislative purpose is found for extending a cause of action to past conduct. For the first time, petitioner would have this Court elevate to constitutional status a distinction heretofore found in state choice of law rules, which are by their nature arbitrary, a distinction between categories of rights designated "procedural" and "substantive."

Suffice it to say that the decision of the court of appeals is squarely within the mainstream of federal constitutional law, while the proposition advanced by the Trust would be revolutionary – and by its own admission, would disrupt carefully formulated compensation schemes not only for victims of the Dalkon Shield, but also for the asbestos victims and for thousands of women injured by silicone breast implants, who have yet to receive their day in court.

A. The court of appeals opinion properly applies the "rational legislative purpose" test for retroactive enactments, a test unchallenged in modern constitutional law.

The appellate court's exposition of the constitutional principles applicable to the Oregon amending statute makes it clear that there is no split of authorities between various federal courts or circuits, or any deviation in the clear line of cases that began with *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). That decision has been followed by the Court in *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984), and most recently in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), and *Plaut v. Spendthrift Farms, Inc.*, 115 S.Ct. 1447 (1995).

All of those decisions apply a standard which has come to be known as the "rational legislative purpose" test, giving due deference to the legitimacy of legislation reflecting reasonable public policy. As stated in *Turner Elkhorn, supra,* this Court has established

> . . . that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

428 U.S. at 15. There is no *per se* or vested right, nor any grounds to complain unless the legislative purpose or process is somehow deficient. Significantly, none of those decisions turn on an artificial distinction between substantive and procedural rules of timeliness, which state courts have relied on to carve out choice of law standards. That distinction has not been elevated to constitutional status by decisions of this Court, nor should it be in this case.

Petitioner has not contended either in the district court nor on appeal that the Oregon Legislative Assembly acted irrationally or arbitrarily in granting relief to Dalkon Shield victims. Rather, petitioner asserts that the legislature simply lacked power in any event to abolish or modify the statute of repose which it had itself imposed, arguing that the lawmakers had created an irrevocable "immunity" from suit.[2]

---

[2] As will be seen below in Part E, petitioner's contention against retroactivity ignores the fact that when Ms. Shadburne was injured in 1976, the statute of repose in issue had not even been enacted. Apparently non-retroactivity is a one-way street.

However it is difficult to fathom a genuine difference between the asserted immunity or "vested" right and the "otherwise settled expectations" of a potential defendant in the language of *Turner Elkhorn*, 428 U.S. at 16. Significantly, petitioner has not cited to the Court a recent constitutional decision where a legislative enactment was invalidated for removal of such "immunity." The only constitutional authority referred to from the modern era is *International Union of Electrical Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976). The Court in *Robbins & Myers* in fact reversed dismissal of a fair employment case, holding (as held here) that retroactive application of a remedial statute does *not* offend due process where the legislative purpose was appropriate.[3]

Most recently, the Court in *Plaut v. Spendthrift Farms, Inc.*, 115 S.Ct. 1447 (1995), has made it clear that absent a final judgment in favor of the defendant, the due process argument in unavailing.

B. The court of appeals decision in this case is consistent with decisions of all other circuits which have considered the issue.

The appellate court considering the issue of retroactivity pointed primarily to a recent ruling directly on point from its "sister circuit," the District of Columbia

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[3] Justice Rehnquist in *Robbins & Myers* found a contention identical to that advanced by petitioner here to " . . . rest on an unwarrantedly broad reading of [the Court's] opinion in *William Danzer Co. v. Gulf & Ship Island R. Co.*, 268 U.S. 633. . . . " *See infra*, at Part C.

Circuit, a more clearly focused case in which certiorari was denied. In *Wesley Theological Seminary v. U.S. Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), the appeals court held that legislative amendment of a statute of repose applicable to manufacturers while the action was pending did not violate the defendant's due process rights. Petitioner here concedes that *Wesley* is directly contrary to its position, and attempts to argue that there is a "conflict among the lower federal courts." (P. 11, fn. 4.)

In fact, every federal court decision which has been found by either party, relative to the constitutional issue raised by the petitioner, has *upheld* the legislative action even where the statute in question was a statute of repose. *See, e.g., Murphree v. Raybestos-Manhattan, Inc.*, 696 F.2d 459 (6th Cir. 1982); *Independent School District No. 187 v. W.R. Grace & Co.*, 752 F.Supp. 286 (D. Minn. 1990). *See also, Thornton v. Cessna Aircraft Co.*, 886 F.2d 85 (4th Cir. 1989).

C. The *Danzer* decision on which petitioner chiefly relies is readily distinguishable on several grounds.

Ultimately the petitioner has a single basis for its reliance in this case, namely, the decision of this Court seventy years ago in *William Danzer & Co. v. Gulf & Ship Island R. Co.*, 268 U.S. 633 (1925). The court of appeals after due consideration held that " . . . in light of the more recent Supreme Court precedent," the analysis of *Danzer* and related cases "is outdated and no longer valid for purposes of analyzing the constitutionality of retroactive legislation." (Opinion, p. 11a.) The appellate court rightly

held that today, "the relevant inquiry is whether or not the legislation serves a legitimate legislative purpose that is furthered by rational means." (12a.)

However, in plaintiff's view it was unnecessary for the Court to overrule *Danzer* and its very sparse progeny in order to affirm the constitutionality of the amended statute of repose here. For *Danzer* is poor precedent indeed; it involved *not* a statute of repose at all, affecting (as with the Oregon statute) an existing common law right, but rather a statutory cause of action under the early Interstate Commerce Act, which Act contained its own temporal limitation of the shipper's remedy. That was clearly the basis of the Court's ruling in 1925.

This very narrow applicability of *Danzer* was made clear by the Court itself in its decision twenty years later in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). Although the appellate decision in the present case has grouped *Chase Securities* with *William Danzer* as authorities "no longer valid" for purposes of constitutional analysis (p. 11a), actually *Chase Securities* may be read as wholly consistent with the present court of appeals ruling. For Justice Jackson in that case relegated the scope of *Danzer* to a mere footnote (325 U.S. at 312, fn. 8) and distinguished the *Danzer* case as one "where a statute in creating a liability also put a period to its existence. . . ." *Danzer* was seen then as the type of case in which the limitation was "directed to the newly created liability so specifically as to warrant saying that it qualified the right." (*Ibid.*)

Based both on recent and also on long-established constitutional authority, *Danzer* is inapplicable to judge

the retroactive amendment of a statute of respose in the present context of a common law tort claim. And to the extent that *Chase Securities* is relevant, it supports the lower court's decision, since it expressly distinguished the potential statutory cause of action under the Blue Sky Law, from a common law cause which was unaffected by that act's limitations.

To repeat, there is simply no constitutional authority – none at all, neither modern nor ancient – for the proposition advanced by petitioner, that a common law cause of action may not be "revived" by a state legislature with second thoughts, even when that reconsideration has a rational basis in economic policy or other public policy. What the legislature is permitted to take away, by statute of respose or otherwise, it surely may give back later, equally without impairment of constitutional rights to due process.

D. Choice of law rules and distinctions have never been given constitutional stature.

What petitioner seeks here from this Court is truly revolutionary – to create a new constitutional right never before recognized in any reported decision: an *irrevocable immunity from litigation.*

In citing appellate authority supposedly in support of its novel position, and in arguing for "vested" rights here based on limiting legislation in effect for merely a few years, petitioner cleverly intermixes venerable principles of state choice of law rules with constitutional principles of due process. However the court of appeals was not confused and made the appropriate distinctions

(p. 6a), holding expressly that its own prior decisions such as *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988), dealing with choice of law issues, had no precedential value here.

The lower court in this case had been misled (p. 32a) to follow its choice of law rulings in *President and Directors of Georgetown College v. Madden*, 505 F.Supp. 557 (D. Md. 1980), *aff'd in part*, 660 F.2d 91 (4th Cir. 1981). However the court of appeals rightly found *Goad* and similar decisions not to apply since they "separate statutes of limitations from statutes of repose for choice of law purposes, and this case presents a constitutional issue." (P. 7a).

The court of appeals opinion likewise found "inapplicable in resolving the constitutional issue" the circuit's own 60-year-old decision in *Link v. Receivers of Seaboard Air Line Ry.*, 73 F.2d 149 (4th Cir. 1934), since "*Link* is based upon the same outdated principles upon which *Danzer* is based." (P. 14a.) *Link* just as *Danzer*, involved a statutory (and statutorily limited) cause of action – retroactive amendment to a South Caroline law extending a class of creditors' priority over mortgage lines.

Finally, the appellate court's opinion in this case points out that

> [t]he district court's reliance upon *Dinh [v. Rust International Corp.*, 974 F.2d 500 (4th Cir. 1992)] is misplaced because in that case the appellant *agreed* that the statute of repose created substantive rights in the defendant which once vested could not be legislatively destroyed. *Dinh*, 974 F.2d at 501.

Because the issue was not contested, it was not before the court (p. 14a.) The court might also have noted that in *Dinh*, the issue again did not arise under the U. S. Constitution but rather involved interpretation of a state statute or at most the Constitution of the Commonwealth of Virginia, involved assertion of legislative power to extinguish a cause of action. Significantly, since it was determined that "no right ever came into being" in favor of plaintiff under those documents, 574 F.2d at 502, obviously this Court found it unnecessary to resolve due process issues under the federal laws.

None of the decisions cited by the petitioner comes to grips with the constitutional issue, and truly none is "in conflict" with the court of appeals decision here. All involve either statutory interpretation, or choice of law rules, or both. In short, not a single authority has been cited by the petitioner, nor found by the court of appeals, positing a pertinent distinction between statutes of limitations and of respose for constitutional purposes.

E. The appellate decision was correct for alternate reasons not expressed in its opinion.

Finally, there are several additional or alternate reasons not cited in the court of appeals opinion why certiorari should be denied, since the facts of the case and the legislation attacked by the petitioner do not squarely or fairly present a determinative constitutional issue.

First, the statute of repose at issue here was not even in effect in 1976 when plaintiff Susan Shadburne experienced her devastating injuries. It was enacted broadly in 1977, and limited to exclude IUD victims in 1987, as the

court found. Should due process requirements be found to restrict the power of the Oregon Legislative Assembly retroactively to modify its statute of respose, no less should the same requirements in fairness and common sense dictate that the legislative body may not in the first instance diminish the plaintiff's "vested" rights. *See Wesley Theological Seminary, supra,* 876 F.2d at 122.

Secondly, the district court here overlooked the fact that the Oregon appellate courts have construed their overall statutory scheme (*i.e.,* statute of repose read together with the statute of limitations) to allow *ten years* rather than eight years for an IUD plaintiff to bring suit. *Dortch v. A. H. Robins Co., Inc.,* 650 P.2d 1046 (Ore. App. 1982); *see also Border v. Indian Head Inds., Inc.,* 792 P.2d 111 (Ore. App. 1990). Since Ms. Shadburne brought suit within the enlarged period, the constitutional issue might have been avoided.

Finally, with respect to the public policy issues germane to the "rational legislative purpose" test, it should be pointed out that the original defendant, A. H. Robins Company, voluntarily entered chapter 11 bankruptcy in 1985 expressly to resolve its liabilities to tens of thousands of victims of the Dalkon Shield, most of whom were at that time blamelessly unaware of their cause of action. The Oregon legislature obviously responded in part to that filing; and after a fund of more than $2 billion has been set aside to compensate those victims, it would be most unjust if the *only* IUD victims *not* able to secure compensation are those few women from states which had previously enacted legislation to protect local manufacturers from truly "stale" claims. It would be ironic and offensive to every notion of fairness and public policy if

the prime beneficiary of the Oregon repose statute turns out to be *not* a manufacturer whose business is sought in Oregon, nor even an insurer seeking to limit its risks, but a trust vehicle created by the bankruptcy court in Richmond for the express purpose of compensating Ms. Shadburne and other victims of the notorious Dalkon Shield.

CONCLUSION

For all of the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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No. 95-1154

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DALKON SHIELD CLAIMANTS TRUST,

Petitioner,

v.

SUSAN SHADBURNE-VINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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D. Shadburne's "alternate reasons" in support of the Court of Appeals decision are without merit and, in any event, are irrelevant to the question of whether certiorari should be granted. 8

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No. 95-1154

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DALKON SHIELD CLAIMANTS TRUST,

Petitioner,

v.

SUSAN SHADBURNE-VINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Many of the numerous misstatements of the law contained in Shadburne's Brief in Opposition to the Petition for Certiorari (the "Shad. Opp.") are addressed at Part II of this reply brief, *infra*. More significant for purposes of this petition for certiorari, however, is Shadburne's conspicuous refusal even to mention -- let alone to explain adequately -- a single one of the five state and two federal appellate decisions cited in the Petition as being in conflict with the

Court of Appeals decision here. *See* Part I, *infra*. Shadburne's tacit admissions on these and other points demonstrate that the issue presented is worthy of this Court's attention and the Petition should accordingly be granted.

I. Shadburne has conceded the points pertinent to this Court's decision on certiorari.

A. Shadburne has conceded that the Court of Appeals decision conflicts with the decisions of state appellate courts.

The Trust pointed out in the Petition that the Court of Appeals decision conflicts with the rulings of the appellate courts of five states. (Petition at 3, 8-10.) Shadburne declines to address a single one of these rulings in her opposition. In so doing, Shadburne has effectively conceded that the Court of Appeals decision conflicts on a federal constitutional issue with one or more state courts of last resort, warranting review pursuant to this Court's Rule 10.1(a).

B. Shadburne has conceded that the Court of Appeals decision conflicts with the decisions of federal appellate courts.

The Trust pointed out in the Petition that the Court of Appeals decision conflicts with the rulings of the Eighth and Ninth Circuits. (Petition at 3, 10-11.) Again, Shadburne simply ignores these rulings in her opposition, thereby effectively conceding that the Court of Appeals decision conflicts on a federal constitutional issue with one or more other federal courts of appeals, further warranting review pursuant to Rule 10.1(a).

C. Shadburne has conceded that the Court of Appeals decision carries great precedential significance.

Shadburne half-heartedly offers the conclusory statement that the question presented here is "narrow and

non-precedential." (Shad. Opp. at 3.) Yet she quickly retreats from her unsupported contention, as she asserts that the Trust's position would affect "not only victims of the Dalkon Shield, but also [] the asbestos victims and [] thousands of women injured by silicone breast implants, who have yet to have their day in court." (Shad. Opp. at 5.) Indeed, her new counsel of record filed an *amicus curiae* brief in the Court of Appeals on behalf of the Oregon Trial Lawyers Association, and four other entities have filed *amicus* briefs either in the Court of Appeals or before this Court. Shadburne cannot dispute that the issue presented has far-reaching consequences.

D. Shadburne has conceded that the Court of Appeals overruled this Court's precedents.

Shadburne does not dispute that by electing not to follow the *Danzer/Chase* rule the Court of Appeals violated the rule that only this Court has the authority to overrule one of its decisions. *Rodrigues de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989).

II. The *Danzer/Chase* rule remains good law and precludes the action of the Oregon legislature in this case.

The foregoing points standing alone demonstrate that this Court should grant the Petition to resolve the conflict regarding this important constitutional issue. Even if not for those points, the case would still deserve this Court's attention because, as reflected by Shadburne's arguments, the Court of Appeals decision is simply wrong.

A. The *Danzer/Chase* rule is not altered by the more recent Supreme Court cases upon which Shadburne relies.

Shadburne states:

> By its petition, the [Trust] would have the Court reject and reverse twenty years of consistent constitutional decisions by this

> Court and lower federal courts upholding the retroactive application of a legislature's power to modify its own statutory immunities, as against due process claims.

(Shad. Opp. at 4.) Shadburne cannot, however, cite a single case in which this Court has upheld a legislature's retroactive modification of statutory immunities. The only time that this Court has ever been confronted with such a modification is when it struck down the statute at issue in *Danzer*. Shadburne also states:

> What [the Trust] seeks here from this Court is truly revolutionary -- to create a new constitutional right never before recognized in any reported decision: *an irrevocable immunity from litigation.*

(Shad. Opp. at 10) (emphasis in original). Contrary to this misstatement, such a right was recognized by this Court in *Danzer*, as well as the five state and two federal appellate decisions cited in the Petition but omitted in the Shad. Opp.

At bottom, much of Shadburne's argument amounts to a bald assertion that there has been some sweeping change in the fundamental premises of constitutional analysis since the time of *Danzer* and *Chase*, such that the Court of Appeals was right to disregard those on-point decisions. Neither Shadburne nor the Court of Appeals ever identifies this mysterious change. Indeed, the Shad. Opp. makes no effort to respond to the point pressed unambiguously in the Petition that the triumvirate of cases upon which the Court of Appeals relied (*Turner Elkhorn*, *Gray* and *General Motors v. Romein*) did not present the question of the constitutionality of a legislative revival of an extinguished cause of action. (Petition at 11-15.)[1/]

[1/] Shadburne states that neither *Turner Elkhorn*, *Gray* nor *General Motors v. Romein* "turn[s] on an artificial distinction between substantive and procedural rules of timeliness." (Shad. Opp. at 6.)

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It may be that Shadburne's unarticulated change in the law relates somehow to the view that the Court struck down legislation on several occasions in the early part of this century because the Court disagreed with the legislation's underlying economic philosophy. *See Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963). Such an analysis based on a loose rendition of constitutional history has no place here. The only issue presented in *Danzer* was the constitutional significance of the grant of immunity effected by the expiration of a timeliness provision; questions of economic theory, freedom to contract, freedom from government economic regulation and other supposed hallmarks of constitutional jurisprudence unique to that era were not presented. Further, the two justices who most vehemently dissented from those kinds of decisions were Justices Holmes and Brandies. *See Ferguson*, 372 U.S. at 729. These two justices voted with the unanimous Court in *Danzer*. In addition, even under the loosest version of constitutional history, by the time that *Chase* was decided in 1945, the so-called *Lochner* era from the early part of the twentieth century was over.

Finally, even if there was a fundamental change in the law justifying departure from the *Danzer/Chase* rule, its announcement should come from this Court, not the Court of Appeals.

B. *Danzer* applies to statutes of repose.

As an alternative to arguing that *Danzer* is bad law, Shadburne proposes that *Danzer* should not apply to statutes of repose. (Shad. Opp. at 10-12.) Shadburne denigrates the statute of repose case law as consisting of mere choice of law decisions, holding only that statute of repose analysis is

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The reason for this is obvious: none of those cases involved enlargement of a timeliness rule.

governed by the law of the state whose substantive law controls. Shadburne asserts that the statute of repose cases are therefore unfit for application to constitutional analysis.

Shadburne concedes, however, that the Special IUD Statute "withdrew a statutory **immunity**." (Shad. Opp. Questions Presented for Review) (emphasis added). Shadburne also does not deny that statutes of repose are "substantive" in the sense that they extinguish rights and statutes of limitations are procedural in the sense that they merely bar remedies. It is also clear that the aspect of the timeliness rule in *Danzer* that led this Court to conclude that the rule could not constitutionally be enlarged is that it was designed to extinguish rights, i.e., confer immunity, not merely bar remedies. *See Danzer*, 268 U.S. at 636. It is therefore undisputed that the defining features of statutes of repose are precisely the features that made the enlargement of the timeliness rule in *Danzer* constitutionally infirm.

In addition to contravening this parallel between the *Danzer/Chase* rule and the statute of repose case law, Shadburne's wall between choice of law cases and the *Danzer/Chase* rule is refuted by *Chase*, in which this Court unambiguously linked the choice of law analysis in *Davis v. Mills*, 194 U.S. 451 (1904), with the constitutional issue decided in *Danzer*. In *Davis v. Mills*, this Court held that although forum law typically governs with respect to statutes of limitation, "courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued" provided that the limitations rule "was directed to the newly created liability so specifically as to warrant saying that it qualified the right." *Id.* at 454. Significantly, in *Chase*, after reciting the constitutional holding in *Danzer*, the Court noted the following with respect to *Davis v. Mills*, which, until then, had been only a choice of law case:

> Read with the *Danzer* case, *Davis v. Mills* stands for the proposition that the result may be the same if the period of limitation is prescribed by a different statute if it 'was directed to the newly created liability so

> specifically as to warrant saying that it qualified the right.'

325 U.S. at 312 n.8. Similar analysis appeared in *Campbell v. Holt*, 115 U.S. 620 (1885), where the Court relied upon choice of law authorities in holding that retroactive enlargement of a mere statute of limitations was constitutionally permissible. *See* 115 U.S. at 625-27. Shadburne's contention that *Danzer* does not apply to statutes of repose because such statutes have typically been analyzed in the choice of law context cannot be sustained.

C. *Danzer* is not limited to statutory causes of action.

In another attempt to narrow *Danzer*, Shadburne suggests that the Court of Appeals alternatively could have distinguished *Danzer* on the grounds that the timeliness provision in *Danzer* was contained in the statute that created the cause of action. (Shad. Opp. at 9-10.) Without citing anything from *Danzer* itself, Shadburne asserts that the statutory basis of the cause of action was "clearly the basis of the Court's ruling in 1925." (Shad. Opp. at 9.) Shadburne then departs sharply from the Court of Appeals opinion: whereas the Court of Appeals correctly found that *Chase* reaffirmed the rule that to enlarge a substantive time bar would unconstitutionally revive an extinguished liability (Pet. App. at 8a), Shadburne contends that *Chase* limited *Danzer* to statutory causes of action. (Shad. Opp. at 9.)

Shadburne's view contravenes both the case law and common sense. As described in the Petition (Petition at 6-7), *Chase* reaffirmed *Danzer*'s explicit reliance upon the question of whether the timeliness rule at issue "operates as a limitation upon liability" as opposed to merely "apply[ing] to the remedy only." Shadburne never addresses this analysis. Moreover, as noted above, Shadburne's mechanical rule does not account for the clear convergence of the defining features of statutes of repose and the defining features of the class of timeliness rules that may not be enlarged under *Danzer*. Shadburne herself is forced to make the critical admission

that the Oregon statute of repose has the effect of conferring "immunity" (Shad. Opp. Questions Presented for Review), bringing it within the *Danzer/Chase* rule.

Shadburne's analysis also conflicts with *Midstate Horticultural Co. v. Pennsylvania R.R. Co.*, 320 U.S. 356 (1943), where the Court rejected in another context the mechanical approach that she proposes here. *See* 320 U.S. at 360. Similarly, in *Davis v. Valley Distributing*, 522 F.2d 827 (9th Cir. 1975), the court specifically held that "[a] close reading of *Chase Securities* indicates that the Supreme Court did not distinguish *Danzer* on the ground that the limitations provision was contained in the statute that created the substantive liability." *Id.* at 830 n.7.[2/]

D. Shadburne's "alternate reasons" in support of the Court of Appeals decision are without merit and, in any event, are irrelevant to the question of whether certiorari should be granted.

The "alternate reasons not expressed in [the Court of Appeals] opinion" that ostensibly support that opinion (Shad. Opp. at 12-14) are red herrings. These supposed alternative bases for reversal after remand do not affect the cert worthiness of the cleanly defined constitutional issue presented in the Petition.

2/ Shadburne asserts that the argument found to be an incorrect reading of *Danzer* in *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), was "identical" to the Trust's position here. (Shad. Opp. at 7 n.3.) The defendant in that case appears to have argued that the enlargement at issue was unconstitutional because the cause of action was statutory. This incorrect argument is identical to Shadburne's, not the Trust's.

The points are without merit anyway. The fact that the statute of repose was not enacted until after Shadburne's IUDs were inserted (Shad. Opp. at 12-13) does not preclude reliance upon the statute. *E.g.*, *Marinelli v. Ford Motor Co.*, 696 P.2d 1, 4, *rev. denied*, 701 P.2d 784 (Or. 1985). Shadburne's argument that her claim is timely even under the preexisting statute of repose (Shad. Opp. at 13) is squarely barred by *Dortch v. A.H. Robins Co.*, 650 P.2d 1046 (Or. App. 1982), where the court dismissed a Dalkon Shield claim on identical facts. *See Border v. Indian Head Indus.*, 792 P.2d 111, 114 (Or. App. 1990) (expressly approving the result in *Dortch*).[3/]

Shadburne also refers to "public policy issues," arguing for some unspecified reason that it would be particularly unjust to hold Oregon women to the consequences of the Oregon statute of repose. (Shad. Opp. at 13.) Shadburne does not even attempt to connect these issues to the constitutional issue presented. In any event, a litigant's ability to succeed in a tort suit always depends on the terms of the governing state law. In addition, though it is true that the Trust is neither a manufacturer nor an insurance company (Shad. Opp. at 14), Shadburne has not shown the relevance of that point to the Court's ability to address fully the constitutional issue presented. There is simply no reason why any of these alternate reasons, even if they were meritorious, should affect this Court's decision on this petition for certiorari.[4/]

3/ Shadburne waived this argument by failing to raise it in prior appeals as well as in the District Court.

4/ Given Shadburne's repeated references to her injuries, it bears emphasis that this case was decided at the pleadings stage. Although Shadburne is entitled to the benefit of her allegations, it of course

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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remains to be determined whether she has suffered any injury caused by the Dalkon Shield.